

2008

Rodney J. Yanke v. Shelley Lee Gish : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS
STATE OF UTAH

RODNEY J. YANKE,

Appellant,

-vs-

SHELLEY LEE GISH,

Appellee.

APPELLANTS BRIEF ON APPEAL

CASE NO.: 20081037

JUDGE:

From Washington County No.: 064500711

APPELLANT'S BRIEF ON APPEAL

COMES NOW, RODNEY J. YANKE, Appellant in Proper Person does respectfully submit his APPELLANT'S BRIEF ON APPEAL, and related documentation necessary with the filing of his brief.

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QUESTIONS PRESENTED

I. DID THE TRIAL COURT ERR FINDING NO FRAUD, COERCION, OR MATERIAL NON-DISCLOSURE WAS PRESENT AT THE TIME THE PROPERTY SETTLEMENT AGREEMENT WAS SIGNED BY THE PARTIES?

II. DID THE COURT ERR WHEN IT DENIED DISCOVERY OF ASSETS MISSING OR TRANSFERRED, AND MAKING A DIVISION OF PROPERTY WITHOUT DETERMINING WHAT PROPERTY WAS SEPARATE OR MARITAL, AND DETERMINING A VALUE TO ALL OF THE PARTIES PROPERTY IN QUESTION, AFTER THE FINDINGS OF A MARRIAGE OF SHORT DURATION?

III. DID THE COURT ABUSE ITS DISCRETION OR VIOLATE THE PARTIES RIGHT TO DUE PROCESS WHEN IT REFUSED TESTIMONY OF WITNESSES WITH EVIDENCE MATERIAL TO THE CASE?

IV. DID THE COURT ERR DENYING A SUBSEQUENT TRIAL FOLLOWING THE SECOND EVIDENTIARY HEARING AND ITS FINDINGS OF FACT OBTAINED AT THE EVIDENTIARY HEARINGS?

STATEMENT OF THE CASE

Appellant has sufficiently demonstrated the Appellee was on a course of action to take as much property from the Appellant and his children, by hook and by crook, in every form and fashion, and when all that could be taken was, Appellee filed for divorce from their marriage of four months.

The trial court committed reversible error in its decisions concerning the enforceability of a Property Settlement agreement, failure to determine the classification as to marital and separate property, and prematurely ended the proceedings where findings and conclusions were not specifically stated or clarified, before it signed the decree of divorce between the parties, thus enabling the parties to adequately prosecute the case presented to it.

Appellant seeks to reverse these errors.

STATEMENT OF THE FACTS

1. Shelley Lee Gish, Appellee, and Rodney J. Yanke, Appellant, had a professional and romantic relationship, resulting in a legal marriage on December 30, 2005. (See: Court Exhibit #4)

2. Yanke inherited a large amount of cash and property following the death of his mother on February 17, 2003. Yanke also controlled the funds inherited by his three minor children, which he invested in two properties detailed later in this brief.

3. Because of Yanke's medical condition at this time, and Gish's fiduciary duties in regard to him personally and professionally, Yanke added Gish to his Las Vegas financial accounts 4 days following the passing of his mother. (See: Court Exhibit 24). He further

testifies that \$80,000 to \$90,000 was in his safe deposit box at this time, and that he put her name on the account in case something happened to him, and ended with:

“I trusted her with my life.” (See: March 19, 2008 Evid. Hrng. Transc. Pg 28, line 21)

4. On March 10, 2003, Yanke signed on two accounts of Gish’s at Mountain America Credit Union. Account number 7670033 had been fraudulently created with a faked Utah Driver License by Gish. (See: Court Exhibit 22). This exhibit clearly shows Gish opened this account indicating a last name of ‘Yanke’ with a Utah Drivers License (number 148239878 on February 26, 2003, only 9 days following the death of Yanke’s mother. Shelley Lee Gish’s correct Utah Drivers License number is 148239678 (See: Court Exhibit 24). Gish stated she had never changed her name with the driver license division, further indicating her state of mind, and timing of the bank fraud she committed at Mountain America Credit Union on February 26, 2003 (See: Dec. 12, 2007 Evid. Hrng Transc. Pg 10, lines 23-25)

5. While acting in a fiduciary capacity of Mr. Yanke’s property, Gish began a course of deception, misappropriation of funds, and absconding of Yanke’s property on March 21, 2003, (only 4 days after Mr. Yanke deposited \$26,645.00) where she admitted withdrawing \$14,500, in cash this day alone. Yanke’s counsel explained in chambers that:

“there’s an issue as to the fiduciary duties that was owed for the monies that belonged to the children that was placed into this property.” (Dec. 12, 2007 Evid. Hrng. Transc. Pg 43, lines 5-7)

6. Gish testified in court, that her withdrawals totaled more than \$26,000 from account number 7670033, which Yanke testified was set up Yanke's needs and investment income, without Yanke's knowledge or authorization, in violation of UCA § 22-1-1.

7. Yanke testified that the funds deposited into this account came from Mr. Yanke's life insurance proceeds from his late mother totaling \$10,000.00, the savings account of his late mother totaling \$13,036.00, 401k distributions of \$11,495., and rental income from a Las Vegas rental home of approximately \$4,000 per month, beginning on March 17, 2003. (See: Mar. 19, 2008 Evid. Hrng. Transc., Pg 34, lines 16-21)

8. Mr. Yanke testified to having no knowledge of these withdrawals by Gish, until after Gish served Yanke with divorce paperwork on November 6, 2006. He discovered what Gish was doing after his attorney desired information from the accounts set up for his investments, and from files of the homes he purchased before the December 30, 2005 marriage date.

9. Yanke purchased 4 homes before marriage, those being the properties located at 7311 Falvo Avenue, Las Vegas NV 89131, 570 North Daybreak, St. George UT 84770, 3400 Robbin Court, Santa Clara UT 84765, and 832 South 375 East, Ivins UT 84738. Yanke provided 100 percent of the earnest money, and down payments from his separate and sole property (totaling \$240,000.00) for the acquisition of these properties, and with funds belonging to his children by way of inheritance, to be invested and used to pay for his children's education. Gish admits to her moral agreement with Yanke, and that he put the entire amount of \$240,000 down on all 4 properties, and further states:

“He believes he put \$240,000 down...but as far as my moral agreement to him, that is what I said and that is what I stayed with in my divorce petition to begin with, and in—all the way through this case.” (See: Dec. 12, 2007 Evid. Hrng Transc. Pg. 43, lines 17-21.)

10. Admitted Court Exhibit 7, (Petition for divorce authored by Gish on October 26, 2004, and notarized by her on May 13, 2006), Items 6, 6.1, and 6.2, contains the evidence that Yanke was the only one to invest in the properties at 7311 Falvo Avenue, Las Vegas; 570 North Daybreak, St. George, and 3400 Robin Court, Santa Clara, where Gish requested in all 3 sections that:

“... we will repay Rod for the down payments and divide the profits.”

Nothing included in this verified petition indicates Gish invested any of her own into the acquisition of these properties, and was initially authored by her just 8 weeks prior to Yanke investing \$40,617 to acquire the property at 832 South, 375 East Ivins UT 84738.

11. Further evidence as to the property acquisition, purchasing of investments, and ownership rights of Yanke are present in Gish’s admitted Court Exhibit 10, a holographic will of Yanke, whereby he did at that time will to Gish the:

“entirety of my property, both real and personal, including my home at 7311 Falvo Avenue, Las Vegas NV 89131; 570 North Daybreak, St. George UT, 84770, and 3400 Robin Court, Santa Clara UT, 84765...” (See also: Dec 12, 2007 Evid. Hrng. Transc. Pg 86, lines 1-3)

This clearly indicates that as of September 25, 2004, the date of that will, Yanke believed these three homes to be his real property, with the term “my property”.

12. Yanke admitted, as Court Exhibits 12 through 15, the source of funds used to acquire and purchase the real property located at:

7311 Falvo Avenue, Las Vegas NV 89131 (See: Court Exhibit 12),
570 North Daybreak, St. George UT 84770 (See: Court Exhibit 13),
3400 Robbin Court, Santa Clara UT 84765 (See: Court Exhibit 14, and
832 South, 375 East, Ivins UT 84738 (See: Court Exhibit 15).

13. Yanke provides testimony that 100 percent of the funds used to acquire and purchase the Las Vegas and St. George properties came from his separate funds as admitted as Court Exhibits 12 and 13.

Yanke provides testimony that 100 percent of the funds used to acquire and purchase the Santa Clara and Ivins properties came from both Yanke's separate funds, and funds of his children's inherited property, as admitted as Court Exhibits 14 and 15.

14. Both parties testified that the Santa Clara property was purchased with \$60,000 of Yanke's inherited funds, and another \$15,000 which came from the Yanke children's inherited funds. Gish adds:

"We had had so much trouble getting loans with his name on them because of his own divorce papers and problems that we were doing the loan in my name..."
(Mar. 19, 2008, Evid. Hrng. Transc., Pg 73, lines 16-25)

This clearly shows the initial intent was to get this home in Yanke's name, and was titled in Gish's name only at the time of purchase because of the financial problems of Yanke.

15. Ms. Gish made several false and inconsistent material statements under oath, including claiming she had paid \$19,000 down on above mentioned Ivins property, by way of a second trust deed note from the seller, as her down payment. As a Utah licensed Real Estate and Mortgage Officer, Gish is quite aware a trust deed is a loan carried back from the seller, and has knowledge that her statement was indeed false. Yanke's

admitted Court Exhibit 15 clearly indicates that this trust deed note is indeed a loan, not a down payment for acquisition as Gish states. Both Yanke's and Gish's name appears on the deed, not hers alone, thus proving both were obligated for repayment of that loan. Admitted Court Exhibit 15 also proves that Yanke alone put 100 percent of the funds towards the acquisition and purchase of the Ivins investment property.

16. Yanke allowed Gish, by Power of Attorney (POA) dated July 8, 2003, along with other financial actions, to acquire the homes in her name for the benefit and behalf of Yanke, located at 3400 Robbin Court, Santa Clara, and 832 S. 375 East, Ivins homes, which allowed title to these properties to be in Gish's name, without her actually having equitable title to those properties. (See: Court Exhibit 20) This power was granted only 8 days before Yanke gave checks to Gish for acquisition and purchase of the Robbin Court home in Yanke's behalf and benefit, and demonstrates the intent of Yanke to allow these acts by Gish for his purposes, not to gift these properties to her. (See court Exhibit 14)

In violation of UCA § 75-5-503(3), while acting for the benefit of the Yanke as his attorney-in-fact, Ms. Gish began gifting to her family, and herself, real and personal property of Mr. Yanke's, the principle of the given Power of Attorney.

17. Yanke had no intention of giving Gish power to take all of his life savings, retirement funds, income, inherited funds, and the property willed to his children for Gish to keep as her own and to do what she wanted regardless of Yanke's wishes. Gish claims

to have had a Temple Recommend at that time, and Yanke trusted her to do right in behalf of him. This power was granted at a time when Yanke was distressed and was:

“At this time--I was somewhat ill during this time.” (See: Dec 12, 2008 Evid. Hrng. Transc. Pg 118, line 14.),

Yanke signed the POA where specified protections included:

“for my use and benefit” (Section 1 at end), “...if I were personally acting on my own behalf” (Section 5, Part c.), “...and transact all and every kind of business of whatsoever nature as my attorney in fact shall deem proper” (Second Section, at end of Item C). (See: Court Exhibit 20)

None of the actions Gish completed by way of the given POA, or her fiduciary duties to him, were for the benefit of, or in behalf of Yanke. Gish’s actions were not proper given the circumstances and evidence presented in court. It is clear, by the evidence presented, that Gish used that POA to unjustly enrich herself of property belonging to the principle, Yanke and his children.

18. Yanke testified of the stress, coercion, and duress Gish was putting him through when sometime after May 11, 2006. Gish locked him out of their home, refused to allow him in, and gave him divorce paperwork notarized on May 13, 2006. (See: Court Exhibit 7) It was at this time that Gish offered a Property Settlement Agreement (PSA) for Yanke to sign with her. Yanke testified:

“I was kicked out of my house, thrown divorce papers and told to sign it”. (See: Dec. 12, 2007 Evid. Hrng. Transc. Pg 128 line 6)

Yanke stated his only reason for signing was:

“to prevent divorce, continue the marriage, and also so I can be back in my home.” Yanke also states: “well—I think she just set me up. It was a big scam.” (See: Dec. 12, 2007 Evid. Hrng. Transc. Pg. 128, beginning at line 18)

Yanke further testifies to his knowledge of contract law and his state of mind at the time he signed the PSA with:

“and knowing that with a great amount of duress that a contract would be unenforceable or at least voidable due to the lack of mutual assent and my being able to voluntarily enter this agreement with my own free will.” (Dec 12, 2007 Evid. Hrng. Transc. Page 129, lines 11-14)

19. Yanke testified that the PSA had been authored solely by Ms. Gish, with her added testimony that she had often seen attorneys for the creation of the PSA. Gish testified:

“I had gone and seen two lawyers, and in them going over with me my feelings for Mr. Yanke, in spite of his problems, then Mr. Jensen, an attorney in St. George said that the post nuptial agreement could be as effective as a prenuptial agreement...that I should write and do a post-nuptial agreement.” (See: Dec. 12, 2007 Evid. Hrng. Transc. Pg. 91, lines 6-12)

Both parties testified that Mr. Yanke was not given the opportunity to seek legal counsel before signing, nor that any time was given for him to do so. Gish later states at that hearing, on Pg. 96, line 9 that “neither party saw an attorney at this time” then added about Mr. Jensen that “I saw him much...” thus contradicting her own testimony. Gish further adds on page 96 that she “was basing upon what Mr. Jensen told her to do”, and added that she “believed Yanke never saw an attorney” to have reviewed the PSA Gish authored, before Yanke had signed the agreement.

20. At the time of signing the PSA, Gish never accounted for the missing money before the signing of the PSA. Gish also claims to have invested \$58,000 from the sale of her home, and wanted to be repaid that amount on the Property Settlement Agreement (See: Court Exhibit 5, Item 1C) Gish states using this money for bills, not investments and ended her testimony of where it had gone with:

“Then that money was down to about \$10,000 when we separated.” (See: Dec. 12, 2007 Evid. Hrng Transc. Pg 52, line 6)

This statement clearly shows Gish had not included this amount within the PSA, and constitutes additional material non-disclosure on her part in drafting the PSA. Yanke further claims missing from the PSA are amounts he claims to have documentation on, ending with:

“So there’s \$95,000, \$150,000, \$58,000, and \$60,000.” (See: Dec 12, 2007 Evid. Hrng. Transc. Pg 38, lines 17-25)

21. Yanke was also unaware at the time of signing the PSA that Gish transferred property belonging to himself and his children to others. On direct, Gish stated at the time of signing the PSA, she had already quitclaimed the Ivins investment property (bought through the power of attorney) to herself, and her son, Justin, because:

“I wanted someone else on title in case I died.” (See: Dec. 12, 2007 Evid. Hrng. Transc. Pg. 45, line 11)

This act by Gish clearly shows she had no intention of protecting Yanke’s property interests and shows clear intention to deprive Yanke and his children of their property,

unjustly enriching herself by way of prohibited conduct of an attorney in fact with fiduciary duties towards the principle (Yanke) of the given power.

22. Gish completed parts of the PSA, one of them being the refinance of the 3400 Robbin Court home. She obtained \$94,891.72 on July 18, 2006 (See: Court Exhibit 17, Pg 2, bottom line of handwritten complaint). Gish has failed to complete her contractual obligations of paying Yanke half of those monies of \$47,445.00 at a reasonable time following her receipt of those funds. She states she has paid off the HELOC (home equity line of credit) with \$27,500 going to Yanke (See: Dec 12, 2007, Evid. Hrng Transc., Pg 50, lines 9-24) The contract clearly states on Item 1A that the Heloc is to be paid off after the sale of the home, not at the time of refinance. Gish is in breach of contract by her failure to abide by its terms, and Gish further breaches the contract where she failed pay Yanke \$47,445.00 following the refinance.

23. Gish further presents her fraud upon the court on March 19, 2008, when she had admitted into exhibit an altered Property Settlement Agreement. (See: Court Exhibit 21) Gish states she added the handwritten 'or' next to Item 1E. (See: Mar. 19, 2007 Evid. Hrng Transc. Pg 82, lines 20-23)

24. This PSA had been presented previously by her on June 13, 2007 within her Affidavit in Support of Motion to Enforce Agreement. (See Addendum Exhibit A, on last page, Item 1E). Item 10 within her affidavit states Exhibit "B" is a true and correct copy. Yanke also admitted the correct PSA as Court Exhibit 5. Neither of these exhibits, offered previous to March 19, 2007, by both Gish and Yanke, had a handwritten 'or' next

to Item 1E. No mention of it exists when Gish gave testimony of it on page 51 at the December 12, 2007 evidentiary hearing. Yet, on March 19, 2008, Gish testifies that this new agreement (Court Exhibit 21) is a copy of the original. This altered document with the 'or' present, substantially changes the terms of the PSA by more than \$240,000, that is to go to Yanke, and is direct evidence that Gish has committed a second degree felony on the stand by her repeated inconsistent material statements under oath.

25. The court erred when it has ignored the rules governing Postnuptial (Ante-nuptial) and Property Settlement agreements wherein fraud, coercion or material non-disclosure, when present, determines these contracts unenforceable and voidable. Unbelievably, the court, in its findings of fact and conclusions of law entered on August 26, 2008, there were absent these indicators of fraud, coercion, or material non-disclosure, and thus deem it enforceable.

26. Yanke has effectively marshaled the evidence, and sufficiently demonstrated by testimony and exhibits that at the time of signing, present were: (1) fraud, (2) fraudulent transfer of real property, (3) Appellants signing agreement under duress and coercion, (4) material nondisclosure, and (5) failure to allow review by legal counsel, are not absent at the time of signing the PSA, thus making that contract voidable.

27. This court has clearly been either prejudiced and/or biased in favor of Gish, and against Yanke. In every motion and requests favorable to the Yanke, except Motions to Enlarge time, the court has either ignored all requests, or outright cancelled or denied them. (See Addendum Exhibit "B")

28. In every motion in favor of the Gish, the court has ruled favorably to the point where Yanke's Constitutional right to due process under the law was denied. Yanke's council expressed this in open court as to allowing witnesses at an evidentiary hearing:

"a witness who is not subject to the jurisdiction, and a resident of Mexico, is present in the courtroom, and that his testimony and documents he brought with him is essential to this matter, and that to deny Reverend Puig's testimony at this time would be a violation of the due process right of my client in that he is an essential witness and he does have testimony and was not subject to the jurisdiction of this court prior to his voluntary appearance today." (See: March 19, 2008 Evid. Hrng Transc., Pg 4)

Throughout the March 19, 2008 hearing, both Yanke and Gish gave testimony indicating the presence of witnesses who had information material to the case. The court denied such testimony by any witnesses other than Yanke and Gish at this hearing.

29. Through his attorney, Yanke attempted to get the trial court to revise its findings of facts and conclusions of law, and to clarify findings in light of the evidence presented during the two evidentiary hearings, by way of a Rule 52 motion on September 8, 2008. (See: Addendum Exhibit C) The court has denied the Appellant any trial in the case, in which he was to marshal the evidence after the findings of fact and conclusions of law were ruled upon and clarified, thus allowing adequate prosecution of the case being appealed, and his right to due process under the law.

30. The court signed the Supplemental Decree of Divorce (See: Addendum D), without addressing the concerns Yanke attempted to get clarified and revised through his attorney mentioned in Addendum Exhibit C.

31. Yanke repeatedly attempted to obtain relief from the court where improper practices in violation of the Utah Rules of Civil Procedure. Even Judge Ludlow indicated two instances of such improper practices in his Findings of Fact and Conclusions of Law Entered on August 26, 2008:

“Because no depositions have been taken in this case, and because competing affidavits were presented regarding the facts underlying the findings and conclusions filed on April 17, 2007, and the order filed on August 7, 2007, the Court has determined that such findings and conclusions and order were improperly entered in the absence of an evidentiary hearing. See e.g. Stan Katz Real Estate, Inc. v. Chavez, 565 P.2d 1142, 1143 (Utah 1977)” (See: Addendum Exhibit E, page 1 at bottom)

SUMMARY OF ARGUMENT

The Property Settlement Agreement authored by Gish, was created in a negative environment complete with coercion Yanke was experiencing at the hand of Gish, completed with all the elements of Fraud, Coercion, and Material Non Disclosure, of which if any single element is present, the entire contract is voidable, and authored the contract by advice of counsel, while denying Yanke the right to do the same.

In violation of UCA §76-8-502, Gish submitted an altered Property Settlement Agreement at the second evidentiary hearing, which substantially changed the terms of the agreement by at least \$240,000.00.

Gish’s quitclaim to property to her son Justin, then retained control of the property which indicates a fraudulent transfer of property under the Utah Fraudulent Transfers Act.

Banking accounts Yanke contributed funds to should be considered owned by him in direct proportion to his net contributions.

Yanke is at a loss when the trial court determined that none of the above mentioned elements were present were accepted as such by the trial court, though the quantity and weight of the evidence presented showed just the opposite. A trial should have been ordered to be heard, after the evidentiary hearings determined what was to be allowed, and discovery was completed.

ARGUMENT

Yanke has marshaled the evidence indicating that there was present at the time of the parties entering into a property settlement agreement, fraud, coercion and (not merely 'or') material non-disclosure was not absent.

The Property Settlement Agreement (PSA) signed by the parties on May 19, 2006, and the circumstances surrounding its execution, contains all of the components to make it void, those being:

Fraud by the

1. Fraudulent transfer of the Ivins investment home to Gish's son,
2. Insistence of Gish to have it signed before Yanke could obtain legal assistance.

Coercion with

1. Threats of divorce by Gish, notarized on May 13, 2006, and handed to Yanke just days before the signing of the agreement.
2. Refusal to allow Yanke back into the marital home unless signed.

Material Non-Disclosure by

1. The repeated withdrawals by Gish of Yanke's premarital and inherited funds without his knowledge or authorization later discovered by Yanke.
2. The failure to include all of the party's property within the agreement.
3. The failure of Gish to provide accounting of rental income, separate, and

marital funds missing and allegedly absconded and concealed by Gish.

4. The failure of Gish to provide a detailed list of assets and liabilities of both parties.

5. The failure of Gish to provide an accounting of her alleged \$58,000 investment obtained from the sale of her personal home in May of 2005.

“a postnuptial agreement is enforceable in Utah absent fraud, coercion, or material nondisclosure” D’Aston v. D’Aston, 808 P.2d 111 (Utah Ct. of App. 1990)

The PSA had unclear terms, and of the terms that had been completed by Gish, she failed in providing funds and property to Yanke in good faith, by the implied obligation of good faith and fair dealings between spouses. The following cases describe issues presented:

“The parties' stipulation was properly set aside as the product of duress, where the record showed that the wife feared the husband, that he had abused and threatened her, and that she was mentally exhausted and felt hopeless.” Putnam v. Putnam, Vt., 689 A.2d 446 (1996).

“An unclear or incomplete agreement is generally construed against the party who drafted it.” See, e.g., Franklin v. Franklin, 262 Ga. 218, 416 S.E.2d 503 (1992); Bernal v. Nieto, 123 N.M. 621, 943 P.2d 1338 (Ct. App. 1997); Winnigstad v. Winnigstad, 99 Or. App. 682, 784 P.2d 101 (1989).

“Courts are especially likely to construe an agreement against the drafter when the agreement was drafted by an attorney spouse and the other spouse lacked independent counsel.” See Williams v. Waldman, 108 Nev. 466, 836 P.2d 614 (1992).

“One particular type of absurd result which the courts try especially hard to avoid is a construction which allows one party to impose substantial unexpected adverse consequences upon the other party. The New York courts have stated this point as a rule against construing the agreement to leave one party at the mercy of the other party.” See Comras v. Comras, 195 A.D.2d 358, 600 N.Y.S.2d 61 (1993)

Where Gish threatened divorce repeatedly during their relationship and marriage, the court should establish a creditor and debtor relationship, and seek to find relief, and distribute property according to those principles:

UCA § 25-6-1, et seq. A creditor is a person who has a claim, and a claim is broadly defined as "a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." Act § 1(3). Threats of divorce are sufficient to make one a creditor. Bradford v. Bradford, 993 P.2d 887 (Ut. App. 1999)

The trial court failed in its duty to classify all of the property before it was divided.

Specifically, the court of appeals requires detailed findings as to the classification of property before it is divided. See Haumond v. Haumond, 793 P.2d 421 (Utah App. 1990) (remanded for findings as to the source of disputed properties); Rapple v. Rapple, 855 P.2d 260 (Utah App. 1993) (similar result); Burt v. Burt, 799 P.2d 1166 (Utah App. 1990) (similar result).

UCA §30-3-5 (7)(c) In marriages of short duration, when no children have been conceived or born during the marriage, the court may consider the standard of living that existed at the time of the marriage.

Banking accounts Yanke contributed funds to should be considered owned by him in direct proportion to his net contributions. The Utah Code Annotated states:

UCA § 75-6-103. Ownership during lifetime. (Utah Uniform Probate Code)

(1) A joint account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent.

Gish's transfer of the Ivins investment property was not done in good faith.

UCA § 25-6-9. Good faith transfer. (Utah Fraudulent Transfers Act)

(1) A transfer or obligation is not voidable under Subsection 25-6-5(1)(a) against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee.

Neither Yanke nor Gish received any funds at the time she transferred ownership in the Ivins investment property to her son, Justin John Gish, with her in joint tenancy. Yanke has demonstrated badges of fraud by Gish evident in the transfer of this property:

In the case of, Taylor v. Rupp 133 F.3d 1336 (1998) the 10th Circuit Court of Appeals outlined the badges of fraud applicable in Utah and listed the badges of fraud in Utah as: (only badges applicable to this appeal case follow)

- (a) the transfer or obligation was to an insider;
- (b) the debtor remained in possession or control of the property after the transfer;
- (c) the transfer was not disclosed or was concealed;
- (f) the debtor absconded;
- (g) the debtor removed or concealed assets;
- (h) the value of consideration received by the debtor was not reasonably equivalent to the value of the asset being transferred or the amount of the obligation incurred;

Gish retained in possession and control of the property after transfer; continued to receive rents from the property; Gish transferred the property to her son Justin, an insider; the transfer was concealed from Yanke; Gish absconded repeatedly and removed and concealed assets; and the debtor Gish, nor Yanke, received any consideration, let alone reasonably equivalent to the value, at the time of, or after the transfer by Gish.

UCA § 25-6-2. Definitions. (Uniform Fraudulent Transfers Act)

In this chapter:

- (4) "Creditor" means a person who has a claim.
- (6) "Debtor" means a person who is liable on a claim.
- (7) "Insider" includes:
 - (a) if the debtor is an individual:
 - (i) a relative of the debtor or of a general partner of the debtor;

Further details about contract in general are specified in Utah Code:

UCA § 15-3-3. Fraudulent transactions not validated.

Nothing herein shall validate a transaction within its provisions which is actually or constructively fraudulent.

Clearly, this transfer is fraudulent and should be found as void, and the ownership in the property should go to Yanke and his children, the investors who contributed 100% of the acquisition funds to purchase that property.

Gish has a substantial conflict of interest, and committed acts which are prohibited as addressed in Utah Code Annotated:

UCA § 75-5-504 states that any transaction by an attorney-in-fact, which is affected by a substantial conflict of interest, is voidable.

UCA § 75-5-503 Power of attorney-Prohibitions and restrictions.

A power of attorney may not be construed to grant authority to an attorney-in-fact or agent to perform any of the following, unless expressly authorized in the power of attorney: (3) make or revoke a gift of the principles property, in trust or otherwise.

Being a Utah licensed Real Estate Salesperson, and Mortgage Officer, Gish knows her fiduciary responsibilities in all aspects and in her exercising actions under the Power of Attorney Yanke gave Gish, the following fiduciary principles apply:

UCA § 22-1-1. Definitions.

In this chapter unless the context or subject matter otherwise requires:

"Fiduciary" includes...or any other person acting in a fiduciary capacity for any person, trust or estate.

"Principal" includes any person to whom a fiduciary as such owes an obligation.

A thing is done "in good faith" when it is in fact done honestly, whether it is done negligently or not.

Gish committed the unthinkable where she brought a fraud upon the court when she had admitted as Court Exhibit 21, an altered PSA complete with her testimony as to its authenticity, after both she and Yanke previously produced true and correct copies without the handwritten 'or' next to Item 1E, in prior affidavits and admissions.

UCA § 76-8-502 False or inconsistent material statements.

A person is guilty of a felony in the second degree if in any official proceeding: (1) He makes a false material statement under oath...or (2) He makes inconsistent material statements under oath, one of which is false and not believed by him to be true.

The Appellate Court should find none of Gish's testimony as credible, and should rule in light most favorable to the true and accurate testimony of Yanke, in every area pertaining to all material facts, evidence, and testimony Yanke has brought forth.


CONCLUSION

Where Yanke has proven Gish has demonstrated breach of fiduciary duties, abuse of power of attorney, fraud, coercion, material nondisclosure, where Gish has entered a false and altered property settlement agreement in court, and has followed through with none of the terms of that contract for the benefit of Yanke, after parts had been completed by Gish, Yanke Hereby Moves the Appellate Court to Order that the property settlement agreement of May 19, 2006 to be void and invalid between the parties.

Where Yanke has proven Gish supplied no funds to acquire and purchase investment properties, and where he has proven he and his children's separate and inherited funds provided a 100% investment in the acquisition and purchase of the properties located at 570 North Daybreak, St. George UT 84770, 3400 Robbin Court, Santa Clara UT 84765, and 832 South, 375 East, Ivins UT, 84738, Yanke Hereby Moves the Appellate Court to Order the transfer of title, use, and possession of those properties back to him in totality and free of any control and ownership interests by Gish, and return the \$94,891.75 Gish obtained in the refinance of the Santa Clara property to Yanke.

Where Yanke has proven there has been misappropriation and absconding by Gish of his separate, and his children's inherited funds, and to determine what funds were separate and marital property, Yanke Hereby Moves the Appellate Court to Order discovery of the whereabouts of those funds, to determine the type and classification of those funds by a forensic accounting firm, with the final determination of what monetary funds go to either party.

Respectfully and Sincerely submitted This 12th Day of October, 2009.



RODNEY J. YANKE
6967 East Bonanza Road
Las Vegas, NV 89110
435-229-5040
Appellant Pro Se

ADDENDUM EXHIBIT “A”

2007, APR 12 5:14:13

Brent M. Brindley - 7148
BRINDLEY SULLIVAN
A PROFESSIONAL CORPORATION
249 East Tabernacle, Suite 102
St. George, Utah 84770
Telephone: (435) 673-9220
Facsimile: (435) 673-3401
Attorneys for Petitioner

IN THE FIFTH JUDICIAL DISTRICT COURT

IN AND FOR WASHINGTON COUNTY, STATE OF UTAH

SHELLEY L. GISH,

Petitioner,

vs.

RODNEY J. YANKE,

Respondent.

**AFFIDAVIT OF SHELLEY L. GISH IN
SUPPORT OF MOTION TO ENFORCE
AGREEMENT**

Case No.: 064500711

Judge: Eric A. Ludlow

Petitioner, SHELLEY L. GISH, being first duly sworn on her oath, deposes and states as follows:

1. I am the Petitioner in the above referenced case.
2. I am a resident of Washington County, Utah.
3. I am over the age of majority.
4. I have personal knowledge and am competent to testify of the matters stated in

this affidavit.

5. Respondent and I have had a tumultuous and somewhat difficult relationship which has caused us to be separated with this divorce action pending.

6. Respondent and I have submitted this case to mediation on several occasions in an effort to resolve our differences and to save our relationship or resolve the issues related to a divorce.

7. On May 19, 2006, Respondent and I entered into a postnuptial agreement that outlined the terms on which we would enter into a legal separation and continue to work on our relationship.

8. On the same day, we entered into a property settlement agreement outlining the general division of our principal assets in the event our attempts to reconcile failed.


9. A true and correct copy of the postnuptial agreement is attached hereto as Exhibit "A".

10. A true and correct copy of the property settlement agreement is attached hereto as Exhibit "B".

11. Respondent and I each entered into the postnuptial agreement and the property settlement agreement of our own free will without any fraud, coercion or material nondisclosure.

12. Our efforts to resolve our relationship have failed and our postnuptial agreement and property settlement agreement should be enforced.

DATED this 8th day of June, 2007.

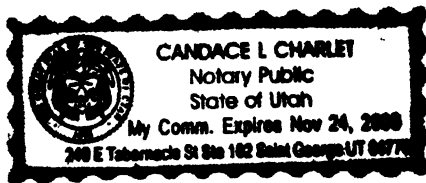

Shelley L. Gish

STATE OF UTAH)
) ss.
COUNTY OF WASHINGTON)

SHELLEY L. GISH, the affiant, appeared before me today and proved to me her identity, then signed this document in my presence, and affirmed that she had read this document, understood its contents, and that the contents were true of her own personal knowledge.

DATED this 8th day of June, 2007.



Notary Public



CERTIFICATE OF SERVICE

I hereby certify that on the th13 day of June, 2007, I served a copy of the foregoing
AFFIDAVIT OF SHELLEY L. GISH on the following by depositing a copy thereof in the
mail, postage prepaid, addressed to:

Christopher A. Tolboe
2181 East Knolls Drive
St. George, Utah 84790



Candy Charlet

EXHIBIT “A”

Post Nuptial Agreement

This is an agreement between Rodney J. Yanke, and Shelley L. Gish AKA Shelley Yanke.

Things are not going well and have not for a long time, but especially since March of 2005. Both parties are feeling angry, hurt, frustrated, and helpless to create any kind of a lasting change, due to some misunderstood differences and Rod's on-going problem of self-medicating which are destroying the relationship..

Both parties are aware of the choices in front of them:

1. To separate now, with specific measurable indicators of getting back together. **But without legal interference..**
2. To get a legal separation, agreed to by both parties.
3. To separate all the properties now, legally, rather than waiting for divorce, as we would do if getting a divorce.

To create measurable results, we agree that: each will have 1-3 times a week. Rod will go to an alanon mtg, a recovery mtg, a church 12 step mtg, and have one date night with Sybil each week. To read scriptures and have prayer together each day, an activity or FHE each week, and **One monthly mediation meeting with the bishop or stake president. with the consequence of not following thru....** being a legal separation or divorce..

Measurable results would be:

1. Kindness in feeling and action toward all family members. No yelling or tantrums.
2. Feelings of intimacy and affection re-established between Rod and Sybil.
3. No smoking or self medicating.
4. Taking an active role in the household with responsibilities for each person.
5. Taking an active role in our business endeavors, paying bills, bank accts, etc.
6. Becoming a full active member of the church.

The purpose of this agreement is to keep things between us civil. Honest and honorable. To give both parties something in writing as a protection and a safeguard in the event one or the other goes to the legal system without the knowledge of the other. If that were to happen, then this agreement would serve to have that process stopped or overturned in a court of law.

It is being created to be a lawful and binding agreement. Signed and notarized properly.

Rodney J. Yanke

Date

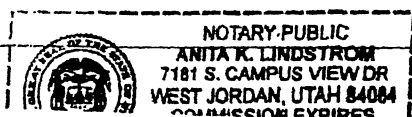
5-19-06

Shelley L. Gish aka Shelley Yanke

Date

5-19-06

Notary



Date

5-19-06

My Commission Expires January

Notary

Subscribed and sworn/Affirmed to before me this 19 day of May, 2006, by Shelley L. Gish AKA Shelley Yanke and Rodney J. Yanke.

County of Washington

EXHIBIT “B”

Property Settlement agreement:

We own 4 houses that are of some worth. They would be divided as follows:

1. 3400 Robbin Court, Santa Clara UT to be the personal residence of Sybil and the kids until it sells. At that time, we will

A. Pay off the house debts, 1st mortgage and Heloc.

B Pay Rod back his \$240,000.00.

C Pay Sybil back her \$58,000.00

D Divide the difference.

E Refi the house loan, to bring down the payments, and each have some cash to move forward with now.

Which would leave all bills and debts as they are now, being paid from the rent, until the house sells.

2. Refi Daybreak home to get Rod off title, or / and this home be quit-claimed to Sybil.

3. Quit claim the Ivins house to Sybil.

4. Quit claim the Las Vegas house to Rod.

5. Infiniti, Chevy Truck and large motorcycle to go to Rod.

6. Saturn, Ford Van and 2 smaller motorcycles to stay with Sybil.

As Rod is moving into a place of his own now... we will divide whatever possessions we have, and he may move whatever of his own whenever he likes. We will have a shared storage unit that we will divide the cost of.

Once the Robbin Ct house sells, Sybil will use her proceeds to find and move into another place, as well.

Anything else we need to think about:

1. Sybil and boys to remain in the home until sale occurs and closes.

2. Rod to move to another place right now.

3. Rod to call before coming over, to be considerate.

This is being created to be a part of the post nuptial agreement, and to be legal and binding.

Rodney J. Yanke
Rodney J. Yanke

5-19-06
Date

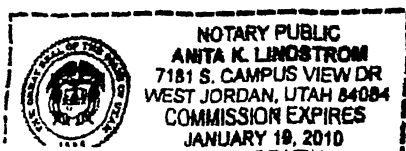
Shelley L. Gish AKA Shelly Yanke
Shelley L. Gish AKA Yanke

5-19-06
Date

Notary

5-19-06
Date

State of Utah
County of Washington



Subscribed and sworn/affirmed to before me this 19th day of May
Rodney J. Yanke AND
20 06, by Shelley L. Gish AKA Shelly Yanke

Anita K. Lindstrom

ADDENDUM EXHIBIT “B”

FIFTH DISTRICT COURT-ST GEORGE
WASHINGTON COUNTY, STATE OF UTAH

SHELLEY L GISH vs. RODNEY J YANKE

FILE NUMBER 064500711 Divorce/Annulment

RENT ASSIGNED JUDGE
ERIC A LUDLOW

TIES

Petitioner - SHELLEY L GISH
Represented by: BRENT M BRINDLEY

Respondent - RODNEY J YANKE
Represented by: CHRISTOPHER A TOLBOE

ACCOUNT SUMMARY

TOTAL REVENUE	Amount Due:	818.50
	Amount Paid:	818.50
	Credit:	0.00
	Balance:	0.00

BAIL/CASH BONDS	Posted:	300.00
	Forfeited:	0.00
	Refunded:	0.00
	Balance:	300.00

REVENUE DETAIL - TYPE: DIVORCE PETN

	Amount Due:	155.00
	Amount Paid:	155.00
	Amount Credit:	0.00
	Balance:	0.00

REVENUE DETAIL - TYPE: VITAL STATISTICS FEE

	Amount Due:	2.00
	Amount Paid:	2.00
	Amount Credit:	0.00
	Balance:	0.00

REVENUE DETAIL - TYPE: ONLINE ASSISTANCE

	Amount Due:	20.00
	Amount Paid:	20.00
	Amount Credit:	0.00
	Balance:	0.00

REVENUE DETAIL - TYPE: DIVORCE COUNTER

Amount Due:	85.00
Amount Paid:	85.00
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: COPY FEE

Amount Due:	1.75
Amount Paid:	1.75
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: AUDIO TAPE COPY

Amount Due:	10.00
Amount Paid:	10.00
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: AUDIO TAPE COPY

Amount Due:	10.00
Amount Paid:	10.00
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: AUDIO TAPE COPY

Amount Due:	10.00
Amount Paid:	10.00
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: COPY FEE

Amount Due:	1.00
Amount Paid:	1.00
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: COPY FEE

Amount Due:	3.25
Amount Paid:	3.25
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: APPEAL

Amount Due:	205.00
Amount Paid:	205.00
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: REPORTER FEES

Amount Due:	315.00
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Amount Paid:	315.00
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: COPY FEE

Amount Due:	0.50
Amount Paid:	0.50
Amount Credit:	0.00
Balance:	0.00

BAIL/CASH BOND DETAIL - TYPE: CASH BOND: Appeals

Posted By:	BRINDLEY SULLIVAN
Posted:	300.00
Forfeited:	0.00
Refunded:	0.00
Balance:	300.00

E NOTE

CEEDINGS

06-06 Filed: Affidavit of Military Service
07-06 Judge ERIC A LUDLOW assigned.
07-06 Filed: Petition
07-06 Filed: Verified Petition
07-06 Fee Account created Total Due: 155.00
07-06 Fee Account created Total Due: 2.00
07-06 Fee Account created Total Due: 20.00
07-06 DIVORCE PETN Payment Received: 155.00
Note: Code Description: DIVORCE PETN, VITAL STATISTICS
FEE, ONLINE ASSISTANCE
07-06 VITAL STATISTICS FEE Payment Received: 2.00
07-06 ONLINE ASSISTANCE Payment Received: 20.00
07-06 Filed: Affidavit of Military Service
07-06 Filed: Petitioner's Affidavit of Jurisdiction and Grounds for
Divorce
07-06 Filed: Property Settlement Agreement
07-06 Filed: Post Nuptial Agreement
03-06 Filed: Notice of Appearance of Counsel
10-06 Filed: Notice of Appearance of Counsel
12-06 Notice - NOTICE for Case 064500711 ID 9478137
MOTION TEMP ORDERS is scheduled.
Date: 12/20/2006
Time: 01:30 p.m.
Location: Courtroom TBD
Fifth District Court
220 North 200 East
St. George, UT 84770

Before Judge: ERIC A LUDLOW

22-06 MOTION TEMP ORDERS scheduled on December 20, 2006 at 01:30 PM
in Courtroom TBD with Judge LUDLOW.

27-06 Filed: Amended Verified Petition

28-06 Filed: Amended Notice of Lis Pendens

30-06 Filed: Motion to Continue Hearing on Motion for Temporary
Orders

04-06 Filed order: Order Continuing Hearing on Motion for Temporary
Orders

Judge JAMES L SHUMATE

Signed December 04, 2006

04-06 MOTION TEMP ORDERS Cancelled.

Reason: Court approved continuance

06-06 Filed: Notice of Signing of Order Continuing Hearing on Motion
for Temporary Orders

04-07 BENCH TRIAL scheduled on January 30, 2007 at 02:30 PM in
Courtroom TBD with Judge LUDLOW.

04-07 Notice - NOTICE for Case 064500711 ID 9507207

BENCH TRIAL is scheduled.

Date: 01/30/2007

Time: 02:30 p.m.

Location: Courtroom TBD

Fifth District Court

220 North 200 East

St. George, UT 84770

Before Judge: ERIC A LUDLOW

.6-07 Filed: Objection to the Notice of Bench Trial

.6-07 Filed: Partial Motion for Summary Judgement to Dismiss the
Petitioner's Amended Verified Petition

.6-07 Filed: Respondent's Affidavit in Support of the Partial Motion
for Summary Judgement

.6-07 Filed: Memorandum of Points & Authorities in Support of
Respondent's Partial Motion for Summary Judgment to Dismiss
Petitioner's Amended Verified Petition

.6-07 Filed: Answer to Verified Petition and Counterclaim Petition
for Divorce

.6-07 Fee Account created Total Due: 85.00

.6-07 DIVORCE COUNTER Payment Received: 85.00

Note: Code Description: DIVORCE COUNTER

3-07 Filed: Notice Vacating Trial Date

3-07 Filed: Supplemental Filing to Respondent's Partial Motion for
Summary Judgment to Dismiss the Petitioner's Amended Verified
Petition

6-07 Filed: Request to Submit for Decision & Request for Hearing

9-07 Filed: Motion to Strike Request to Submit for Decision

Filed by: BRINDLEY, BRENT M

9-07 Filed: Motion for Extension of Time to Respond to Respondent's
Partial Motion for Summary Judgment

Filed by: BRINDLEY, BRENT M

30-07 Minute Entry - Minutes for BENCH TRIAL

Judge: ERIC A LUDLOW
Clerk: janicee
PRESENT

Petitioner's Attorney: BRENT M BRINDLEY

Petitioner(s): SHELLEY L GISH

Attorney for the Respondent: CHRISTOPHER A TOLBOE

Respondent(s): RODNEY J YANKE

Video

Tape Number: 070037 Tape Count: 2:35/2:35

HEARING

Counsel asks the Court for a continuance on this matter.
Court grants request.

01-07 Filed: Answer to Counter-Petition
SHELLEY L GISH

05-07 Filed order: Order Granting Motion for Extension of Time to
Respond to Respondent's Partial Motion for Summary Judgment
Judge ERIC A LUDLOW
Signed February 15, 2007

00-07 Filed: Notice of Signing of Order Granting Motion for Extension
of Time to Respond to Respondent's Partial Motion for Summary
Judgment

08-07 Filed: Affidavit of Shelley L. Gish

08-07 Filed: Memorandum in Opposition to Respondent's Partial Motion
for Summary Judgment

08-07 Filed: Stipulated Motion to Extend Time for Respondent to Reply
to Petitioners Memorandum in Opposition to Respondents Partial
Motion for Summary Judgment
Filed by: TOLBOE, CHRISTOPHER A

09-07 Filed order: Order Granting Stipulated Motion to Extend Time
for Respondent to Reply to Petitioner's Memorandum in
Opposition to Respondent's Partial Motion for Summary Judgment
Judge ERIC A LUDLOW
Signed March 09, 2007

07-07 Filed: Motion for Bifurcated Decree of Divorce
Filed by: GISH, SHELLEY L

09-07 Filed: Respondent's Reply to the Memorandum for Bifurcated
Decree of Divorce Submitted by Petitioner

02-07 Filed: Request to Submit Respondent's Partial Motion for
Summary Judgment for Decision

06-07 Filed: Respondent's Reply to Petitioner's Memorandum Opposing
Respondent's Partial Motion for Summary Judgment

06-07 Filed: Respondent's Affidavit in Support of the Motion for

Summary Judgment

16-07 Filed: Ex Parte Motion to File an Over-Length Brief
Filed by: YANKE, RODNEY J

16-07 Filed: Request to Submit for Decision & Request for Hearing

17-07 Filed order: Findings of Fact and Conclusions of Law Re
Bifurcated Decree of Divorce
Judge ERIC A LUDLOW
Signed April 16, 2007

17-07 Judgment #1 Entered \$ 0.00

17-07 Filed judgment: Bifurcated Decree of Divorce
Judge ERIC A LUDLOW
Signed April 16, 2007

17-07 Case Disposition is Judgment
Disposition Judge is ERIC A LUDLOW

17-07 Filed order: Court's Ruling on Request to Submit for Decision:
Set for Hearing
Judge ERIC A LUDLOW
Signed April 16, 2007

20-07 Filed: Motion of Brent M. Brindley to Withdraw as Counsel of
Record
Filed by: BRINDLEY, BRENT M

20-07 Filed: Notice of Signing of Bifurcated Decree of divorce and
Findings of Fact and Conclusions of Law Re Bifurcated Decree of
Divorce

20-07 Filed: Objection to Petitioners Counsels Motion to Withdraw

21-07 Filed: Objection to Findings of Facts, Re: Bifurcated Decree of
Divorce and Motion to Amend Findings of Fact

24-07 Filed: Withdrawal of Motion

21-07 Notice - NOTICE for Case 064500711 ID 9613495
MOTION HEARING is scheduled.
Date: 06/29/2007
Time: 09:00 a.m.
Location: Courtroom TBD
Fifth District Court
220 North 200 East
St. George, UT 84770
Before Judge: ERIC A LUDLOW

1-07 MOTION HEARING scheduled on June 29, 2007 at 09:00 AM in
Courtroom TBD with Judge LUDLOW.

1-07 Filed: Certificate of Service of Respondent's First Set of
Interrogatories to Petitioner

1-07 Filed: Motion to Quash Subpoenas Duces Tecum
Filed by: GISH, SHELLEY L

1-07 Filed: Memorandum in Support of Motion to Quash Subpoenas Duces
Tecum

4-07 Notice - NOTICE for Case 064500711 ID 9624768
SUMMARY JUDGMENT is scheduled.
Date: 06/26/2007
Time: 02:30 p.m.

Location: Courtroom TBD
Fifth District Court
220 North 200 East
St. George, UT 84770

Before Judge: ERIC A LUDLOW

04-07 SUMMARY JUDGMENT scheduled on June 26, 2007 at 02:30 PM in Courtroom TBD with Judge LUDLOW.

05-07 Filed: Certificate of Service of Respondent's First Request for Production of Documents to Petitioner

07-07 MOTION HEARING Cancelled.

Reason: Court approved continuance

11-07 Filed: Motion to Continue Hearing on Motion for Summary Judgment

Filed by: GISH, SHELLEY L

12-07 Filed return: Subpoena Duces Tecum and Return of Service

Party Served: Zions Bank

Service Type: Personal

Service Date: May 18, 2007

12-07 Filed return: Subpoena Duces Tecum and Return of Service

Party Served: Mountain America Credit Union

Service Type: Personal

Service Date: May 18, 2007

13-07 Filed: Motion to Enforce Agreement and Request for Hearing

Filed by: GISH, SHELLEY L

13-07 Filed: Memorandum in Support of Motion to Enforce Agreement

13-07 Filed: Affidavit of Shelley L. Gish in Support of Motion to Enforce Agreement

19-07 Filed: Affidavit of Respondent in Opposition to Petitioner's Motion to Quash Subpoenas Duces Tecum

19-07 Filed: Respondent's Memorandum in Opposition to Petitioner's Motion to Quash Subpoenas Duces Tecum & Motion to Compel Compliance with Subpoena Duces Tecums

19-07 Filed: Objection to Respondent's First Request for Production of Documents and First Set of Interrogatories to Petitioner

21-07 Filed: Motion for Order to Show Cause

Filed by: TOLBOE, CHRISTOPHER A

21-07 Filed: Respondent's Affidavit in Support of Motion for Order to Show Cause

21-07 Filed: Request to Submit for Decision on Respondent's Motion to Amend Petitioner's Findings of Fact Pursuant to Rule 52(b) & Request for Hearing

25-07 Filed: Notice of Signing of Order Continuing Hearing on Motion for Summary Judgment

25-07 Filed order: Order Continuing Hearing on Motion for Summary Judgment

Judge ERIC A LUDLOW

Signed June 25, 2007

5-07 SUMMARY JUDGMENT Cancelled.

Reason: Court approved continuance

Filed by: TOLBOE, CHRISTOPHER A
20-07 Fee Account created Total Due: 1.75
20-07 COPY FEE Payment Received: 1.75
27-07 Minute Entry - Minutes for MOTION TO AMEND
Judge: ERIC A LUDLOW
Clerk: karenbm
PRESENT

Petitioner's Attorney: BRENT M BRINDLEY
Video
Tape Number: 07-297 Tape Count: 1:41/1:43

HEARING

TAPE: 07-297 COUNT: 1:41/1:43
The Court notes defense counsel's office has called and Mr. Tolboe is unable to attend do to illness.
The matter will be re-set for hearing by the clerk
15-07 Filed: Memorandum in Opposition to Motion for New Trial
9-07 MOTION TO AMEND scheduled on October 09, 2007 at 01:30 PM in Courtroom TBD with Judge LUDLOW.
9-07 Notice - NOTICE for Case 064500711 ID 9704011
MOTION TO AMEND is scheduled.
Date: 10/09/2007
Time: 01:30 p.m.
Location: Courtroom TBD
Fifth District Court
220 North 200 East
St. George, UT 84770
Before Judge: ERIC A LUDLOW
9-07 Filed: Motion to Withdraw
Filed by: TOLBOE, CHRISTOPHER A
0-07 Filed order: Order Granting Motion to Withdraw
Judge ERIC A LUDLOW
Signed September 19, 2007
0-07 Filed: Request to Submit Respondent's Motion for New Trial for Decision
1-07 Filed: Stipulation to Motion to Withdraw
7-07 Filed: Notice to Appear or Appoint Counsel
7-07 Filed: Affidavit of Shelley L Gish
4-07 Filed order: Order Denying Respondents Motion for New Trial
Judge ERIC A LUDLOW
Signed October 02, 2007
5-07 Filed: Withdrawal of Motion
9-07 Minute Entry - Minutes for MOTION TO AMEND
Judge: ERIC A LUDLOW
Clerk: judymb

PRESENT

Petitioner's Attorney: BRENT M BRINDLEY
Petitioner(s): SHELLEY L GISH
Attorney for the Respondent: CHRISTOPHER A TOLBOE
Respondent(s): RODNEY J YANKE
Video
Tape Number: RR-D Tape Count: 2.24-2.52

HEARING

TAPE: RR-D COUNT: 2.24-2.52

The matter today involved the Motion to Amend F of F. Petitioner is not present in the courtroom but can be on short notice if necessary. Discussion held re: Pet's affidavit, validity of marriage. Procedures are discussed. A scheduling conference set for the first week of November, w/Evidentiary Hearing to follow. Three hours will be needed for the evidentiary hearing. 2:52 Off record.

9-07 Filed: Notice of Signing of Order Denying Respondent's Motion for New Trial

1-07 Notice - NOTICE for Case 064500711 ID 9717947

SCHEDULING CONFERENCE is scheduled.

Date: 11/08/2007

Time: 08:30 a.m.

Location: Law & Motion

HALL OF JUSTICE

220 NORTH 200 EAST

ST GEORGE, UT 84770

Before Judge: ERIC A LUDLOW

1-07 SCHEDULING CONFERENCE scheduled on November 08, 2007 at 08:30 AM in Law & Motion with Judge LUDLOW.

2-07 Filed: Motion for Order to Show Cause

Filed by: BRINDLEY, BRENT M

6-07 Filed order: Order Denying Motion to Amend Findings of Fact and Conclusions of Law and Denying Motion for Partial Summary Judgment

Judge ERIC A LUDLOW

Signed November 06, 2007

7-07 Filed: Notice of Signing of Order Denying Motion to Amend Findings of Fact and Conclusions of Law and Denying Motion for Partial Summary Judgment

8-07 Note: *Scheduling conference: Mr. Tolboe was present; an evidentiary hearing of 3 hours is needed per previous hearing on Motion to Amend. Mr. Tolboe suggests after first week of January.

9-07 Notice - NOTICE for Case 064500711 ID 9740945

EVIDENTIARY HEARING is scheduled.

Date: 12/12/2007

Time: 01:30 p.m.

Location: Courtroom TBD
Fifth District Court
220 North 200 East
St. George, UT 84770

Before Judge: ERIC A LUDLOW

09-07 EVIDENTIARY HEARING scheduled on December 12, 2007 at 01:30 PM
in Courtroom TBD with Judge LUDLOW.

09-07 Fee Account created Total Due: 10.00

09-07 AUDIO TAPE COPY Payment Received: 10.00

10-07 Filed: Motion to Set Aside Petitioner's Order Denying Motion to
Amend Findings of Fact and Conclusions of Law and Denying
Motion for Partial Summary Judgment
Filed by: TOLBOE, CHRISTOPHER A

10-07 Filed: Memorandum in Support of Respondent's Motion to Set
Aside Petitioner's Order Denying Motion to Amend Findings of
Fact and Conclusions of Law and Denying Motion for Partial
Summary Judgment

12-07 Minute Entry - Minutes for EVIDENTIARY HEARING

Judge: ERIC A LUDLOW

Clerk: karenbm

PRESENT

Petitioner's Attorney: BRENT M BRINDLEY

Petitioner(s): SHELLEY L GISH

Attorney for the Respondent: CHRISTOPHER A TOLBOE

Respondent(s): RODNEY J YANKE

Video

Tape Number: FTR- J Tape Count: 1:38/5:15

HEARING

TAPE: FTR- J COUNT: 1:38/

Counsel address the Court.

Petitioner and Respondent are sworn by the clerk.

COUNT: 1:45

Shelley Gish testifies.

COUNT: 2:15

Recess.

COUNT: 2:45

On record. Ms. Gish continues to testify.

COUNT: 3:36

Recess.

COUNT: 3:54

On record. Ms. Gish continues to testify.

COUNT: 4:25

Ms. Gish steps down from the witness stand.
Rodney Yanke testifies.

COUNT: 5:13

Mr. Yanke steps down from the witness stand.

COUNT: 5:15

Off record.

14-07 Fee Account created Total Due: 10.00
14-07 AUDIO TAPE COPY Payment Received: 10.00
18-07 BALANCE OF EVIDENTIARY HRG scheduled on January 29, 2008 at
01:30 PM in Courtroom TBD with Judge LUDLOW.
18-07 Notice - NOTICE for Case 064500711 ID 9772753
BALANCE OF EVIDENTIARY HRG is scheduled.

Date: 01/29/2008

Time: 01:30 p.m.

Location: Courtroom TBD
Fifth District Court
220 North 200 East
St. George, UT 84770

Before Judge: ERIC A LUDLOW

18-08 Filed: Motion to Continue Hearing

Filed by: BRINDLEY, BRENT M

10-08 Filed order: Order Continuing Hearing

Judge ERIC A LUDLOW

Signed January 29, 2008

05-08 Filed: Notice of Signing Order Continuing Hearing

18-08 BALANCE OF EVIDENTIARY scheduled on March 19, 2008 at 09:00 AM
in Courtroom TBD with Judge LUDLOW.

18-08 Notice - NOTICE for Case 064500711 ID 9802813

BALANCE OF EVIDENTIARY is scheduled.

Date: 03/19/2008

Time: 09:00 a.m.

Location: Courtroom TBD
Fifth District Court
220 North 200 East
St. George, UT 84770

Before Judge: ERIC A LUDLOW

1-08 Filed: Ex Parte Motion to Permit the Testimony of Witness Jose
Puig

Filed by: TOLBOE, CHRISTOPHER A

1-08 Filed: Request for Expedited Decision Regarding Respondent's Ex
Parte Motion to Permit Jose Puig to Testify

9-08 Minute Entry - Minutes for BALANCE OF EVIDENTIARY HEARI

Judge: ERIC A LUDLOW

Clerk: judymb

PRESENT

Petitioner's Attorney: BRENT M BRINDLEY

Petitioner(s): SHELLEY L GISH
Attorney for the Respondent: CHRISTOPHER A TOLBOE
Respondent(s): RODNEY J YANKE
Audio
Tape Number: FTR-J Tape Count: 9:30-11:50

HEARING

TAPE: FTR-J COUNT: 9:30-11:50

Court & Counsel have met in chambers. Respondents pending motion is Denied (Re: Jose Puig testimony). 9:35 Resp, still under oath, retakes stand to testify. 10:25 Recess 10:47 On record after meeting in chambers. Testimony continues

Petitioner also testifies. 11:40 Testimony concludes. Proposed findings & conclusion due from counsel & Court will take under advisement after 5/01/08 @ 5pm. All documents not specifically received as exhibits will be removed from binder. 11:50

09-08 Filed: (DENIED) Order Granting Respondents Ex Parte Motion to Permit Jose Puigs Testimony

05-08 Fee Account created Total Due: 10.00

05-08 AUDIO TAPE COPY Payment Received: 10.00

01-08 Filed: Stipulated Motion to Enlarge Time for Filing Proposed Findings of Fact and Conclusions of Law
Filed by: BRINDLEY, BRENT M

05-08 Filed order: Order Enlarging Time for Filing Proposed Findings of Fact and Conclusions of Law
Judge ERIC A LUDLOW
Signed May 05, 2008

01-08 Filed: Stipulated Motion to Enlarge Time for Filing Proposed Findings of Fact and Conclusions of Law
Filed by: TOLBOE, CHRISTOPHER A

08-08 Filed order: Order Enlarging Time for Filing Proposed Findings of Fact and Conclusions of Law (The Court grants the extension. Once the Court has received the proposed findings, conclusions and order, the Court will then take the matter under advisement
Judge ERIC A LUDLOW
Signed May 28, 2008

04-08 Filed: Notice of Change of Firm Address

08-08 Note: Volumes 1, 2, & 3 checked out to Jace Willard in Cedar City on 7.28.8.

06-08 Filed order: Findings of Fact and Conclusions of Law
Judge ERIC A LUDLOW
Signed August 26, 2008

08-08 Filed: Motion for Revision of the Courts Findings of Facts Pursuant to Rule 52 & in the Alternative Motion for Clarification & Addition Findings of Fact
Filed by: TOLBOE, CHRISTOPHER A

08-08 Filed: Motion for Enlargement of Time to Submit Proposed Supplemental Decree of Divorce
Filed by: BRINDLEY, BRENT M

03-08 Filed: Memorandum in Opposition to Motion for Revision of Findings of Fact and Request for Hearing

04-08 Filed order: Order Granting Motion for Enlargement of Time to Submit Proposed Supplemental Decree of Divorce
Judge ERIC A LUDLOW
Signed September 18, 2008

07-08 Fee Account created Total Due: 1.00

07-08 COPY FEE Payment Received: 1.00

02-08 Filed order: Supplemental Decree of Divorce
Judge ERIC A LUDLOW
Signed November 10, 2008

04-08 Filed: Notice of Signing of Supplemental Decree of Divorce

08-08 Fee Account created Total Due: 3.25

08-08 COPY FEE Payment Received: 3.25

01-08 Note: Received Transcript Request (Rodney Yanke)

01-08 Filed: Notice of Appeal

02-08 Filed: Notice of Appeal

05-08 Fee Account created Total Due: 205.00

05-08 APPEAL Payment Received: 205.00
Note: Code Description: APPEAL

05-08 Note: Mailed certified copy of Notice of Appeal to the Court of Appeals

05-08 Bond Account created Total Due: 300.00

05-08 Bond Posted Payment Received: 300.00

06-08 Filed: Denied: Affidavit and Application for Waiver of Court Fees

02-08 Fee Account created Total Due: 315.00

02-08 REPORTER FEES Payment Received: 315.00
Note: REPORTER FEES

02-08 Fee Account created Total Due: 0.50

02-08 COPY FEE Payment Received: 0.50

03-08 Filed order: Denied: Court Order on Motion for Waiver of Court Fees (According to Mr. Yanke's financial disclosure he has \$306,000 in equity in the Falvo property. He does not qualify to have the fees waived).
Judge ERIC A LUDLOW
Signed December 23, 2008

ADDENDUM EXHIBIT “C”

matter, or make new findings and conclusions based upon the evidence which has been presented in the memorandum in support hereto.

The basis for this Rule 52 Motion, is as follows:

1. The Court found that the Parties were legally married on December 30, 2005. The Parties separated in May of 2006. This qualifies as a short term marriage, and all properties were acquired with Respondents separate pre-marital and inheritance funds. No properties were acquired during the marital period. The Settlement Agreement (Exhibit 5) indicates otherwise.

2. The Petitioner was determined to be a Utah State Licensed Realtor who had specific Fiduciary duties owing to Respondent which are statutory and are owed under Utah Administrative Code rules and which duties were not followed or honored by the actions of Petitioner in presenting the Settlement Agreement to Respondent.

3. The Petitioner was found to have entered into a Power of Attorney agreement with Respondent when Respondent moved to Utah. Petitioner agreed to act as Respondent's Attorney in Fact and as a result assumed certain statutory duties. As part of such Power of Attorney Agreement, in presenting the Settlement Agreement and in other actions, Petitioner violated statutory provisions regarding gifts to herself and to family members. The Utah Power of Attorney statutes do not allow the settlement agreement obtained by Petitioner and must therefore be disallowed.

4. The Settlement Agreement (Exhibit "5") contains contract provisions that are ambiguous as they are capable of more than one reasonable interpretation because of uncertain meanings or terms, missing terms and other facial deficiencies in the document. See Cox v. Cox 877 P.2d 1262 (July 1994). Such deficiencies will be further set out in the Memorandum of

Points and Authorities attached hereto.

5. The Court failed to fully define the test or standard for review of such settlement contracts. In the case of Reese v. Reese 984 P.2d 987 (UT 1999), spouses....may make binding contracts with each other and arrange their affairs as they see fit, insofar as the negotiation are conducted in good faith and do not reasonably constrain the court's equitable and statutory duties.... In effect, the parties " are held to the highest degree of good faith, honesty, and candor," so long as there is no fraud, coercion, or material nondisclosure".

In this case, the trial court is provided with sufficient evidence supporting and identifying at least one or more of the specified grounds to support modification of the findings of fact and conclusions of law which are supported by the evidence in this case. Braithwaite v. West Valley City Corp., 921 P.2d 997 (1996).

MOTION FOR CLARIFICATION & ADDITIONAL FINDINGS OF FACT

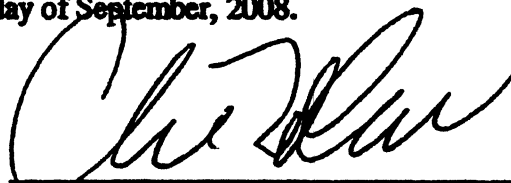
In the alternative, the Respondent moves the Court for clarification and additional Findings of Fact with regards to the Settlement Agreement, (Exhibit 5) in that such document contains many factual errors and in addition, the contract provisions are ambiguous, as they are capable of more than one reasonable interpretation, because of uncertain meanings or terms, missing terms and other facial deficiencies in the document. See Cox v. Cox 877 P.2d 1262 (July 1994). Such deficiencies will be further set out in the Memorandum of Points and Authorities attached hereto.

FILING TIME FOR MOTION

This Motion is to be filed within ten (10) days after entry of judgment or from the date following the mailing of the document. The Mailing certificate shows the mailing date of August

26, 2008, however this conflicts with the actual date the envelope containing the document was mailed, which shows the mailing date of August 27, 2008. As a result counsel for the Respondent did not receive this document due to the holiday weekend and because of the holiday on September 1, Respondent's counsel did not receive this document until September 2, 2008. Therefore, Respondent argues that the filing of this document is timely under the circumstances of the incorrect Mailing Certificate as shown by the Mailing Certificate and by the actual mailing date shown on the envelope. (See Exhibit "A".)

Respectfully submitted this 24th day of September, 2008.

A handwritten signature in black ink, appearing to read "Chris Tolboe", written over a horizontal line.

CHRISTOPHER A. TOLBOE
Attorney for Respondent

CERTIFICATE OF HAND DELIVERY

I certify that this 9th day of September, 2008, I did hand deliver a correct and true copy of the foregoing document, to the following:

Brent Brindley, Esq
BRINDLEY SULLIVAN PC
382 South Bluff, Suite 150
St. George, UT 84770

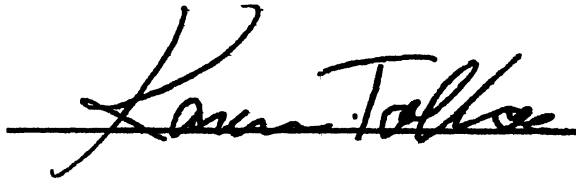
A handwritten signature in cursive script, appearing to read "Karen Tolke", is written over a horizontal line.

EXHIBIT
“A”

ORDER

It is hereby ORDERED, ADJUDGED, and DECREED that:

- 1. Petitioner shall submit a proposed Supplemental Decree, consistent with the foregoing Findings and Conclusions, within 10 days of the date these Findings and Conclusions are issued;**
- 2. Following Petitioner's filing of the proposed Supplemental Decree, Respondent shall have 10 days in which to file any objections, after which Petitioner shall have 10 days to file any response.**

Dated this 26th day of August, 2008.

BY THE COURT



**Eric A. Ludlow
District Court Judge**

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 064500711 by the method and on the date specified.

METHOD NAME

Mail CHRISTOPHER A TOLBOE
 Attorney RES
 2181 E KNOLLS DR
 ST GEORGE, UT 84790

By Hand BRENT M BRINDLEY

Dated this 26 day of August, 2008.

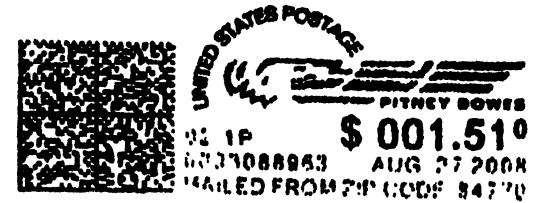
P Jordan
Deputy Court Clerk

Fifth District Court

220 North 200 East
St. George, Utah 84770

Return Service Requested

**CHRISTOPHER A TOLBOE
2181 E KNOLLS DR
ST GEORGE UT 84790**



ADDENDUM EXHIBIT “D”

*Not
Court has to review
of 7/1/08*

Brent M. Brindley - 7148
BRINDLEY SULLIVAN
A PROFESSIONAL CORPORATION
382 South Bluff Street, Suite 150
St. George, Utah 84770
Telephone: (435) 673-9220
Facsimile: (435) 673-3401
Attorneys for Petitioner

IN THE FIFTH JUDICIAL DISTRICT COURT

IN AND FOR WASHINGTON COUNTY, STATE OF UTAH

SHELLEY L. GISH, Petitioner, vs. RODNEY J. YANKE, Respondent.	SUPPLEMENTAL DECREE OF DIVORCE Case No.: 064500711 Judge Eric A. Ludlow
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This matter came before the Court for hearing on December 12, 2007 and again on March 19, 2008. Petitioner was present and was represented by her counsel, Brent M. Brindley. Respondent was present and was represented by his counsel, Christopher A. Tolboe. The Court heard the testimony of the parties and received documents into evidence. Based on the evidence presented, the Court made its Findings of Fact on August 26, 2008. The Court now enters its Supplemental Decree of Divorce.

It is hereby ORDERED, ADJUDGED, and DECREED:

1. Petitioner is a resident of Washington County, Utah, and had so resided for more than three months prior to the commencement of this action.

2. On September 28, 2001, the parties participated in a marriage ceremony performed by Jose Puig, a minister of the Universal Life Church in Rosarito Beach, Mexico. Although Petitioner considered this ceremony to be a legal and binding marriage, and conducted herself thereafter as if married to Respondent, the Court found that the ceremony on September 28, 2001, was not a valid marriage.

3. The parties were later legally married on December 30, 2005.

4. The parties were divorced by this Court's Bifurcated Decree of Divorce on April 17, 2007.

5. During the marriage the parties purchased several parcels of real property.

6. The parties entered into a property settlement agreement (the "Agreement") on or about May 19, 2006, which is binding upon the parties. The parties' real properties shall be awarded between them as stated in the Agreement.

7. Pursuant to the Agreement, possession of the parties' home located at 3400 Robbin Court, Santa Clara, Utah, is awarded to Petitioner as her residence until the home is sold. The Robbin Court home is titled in Petitioner's name only. Petitioner shall list the Robbin Court home for sale immediately and upon sale of the home, the proceeds shall be applied first to pay off the mortgage and home equity line of credit, second to pay Respondent \$240,000.00 and Petitioner \$58,000.00, and any remaining proceeds shall be divided evenly between the parties.

8. The parties acquired a home located at 570 North Daybreak Drive St. George, Utah. The Daybreak home is awarded to Petitioner free and clear of Respondent's interest as stated in the Agreement. Respondent shall cooperate in removing his name from the title and the mortgage on the Daybreak home with 30 days of the entry of this Supplemental Decree. Any liens recorded against the Daybreak home shall be removed immediately upon entry of this Supplemental Decree.

9. The home located at 832 South 375 East Circle in Ivins, Utah, is awarded to Petitioner free and clear of Respondent's interest, as stated in the Agreement. Respondent's name is not on the title nor the mortgage to the Ivins home. Any lis pendens recorded against the Ivins home should be removed immediately upon entry of this Supplemental Decree.

10. The home located at 7311 Falvo Avenue, Las Vegas, Nevada, is awarded to Respondent free and clear of Petitioner's interest. Any lis pendens recorded against the Falvo home shall be removed immediately upon entry of this Supplemental Decree.

11. At trial the parties reached an agreement regarding division of personal property. The parties are each awarded the personal property as agreed. Further, Respondent has possession of many items of Petitioner's personal property which have not yet been returned. These items include Petitioner's work files, over 20 years of past files, rental and home files, banking records, tax records, baby books for some of her children, journals, genealogy records, children's school files, personal address books, memoirs, family photographs, clothing and other personal items and effects. The parties shall exchange the personal property within 30 days of the entry of this Supplemental Decree.

12. Respondent shall be enjoined from making any further defamatory statements regarding Petitioner in any context or forum, whether online, in print, or verbally, or in any other way.

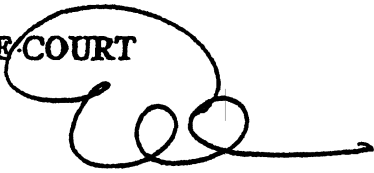
13. Respondent is enjoined from interfering with, changing or using any of Petitioner's accounts, such as her credit cards accounts, utility accounts, bank accounts, e-mail accounts and passwords, and so forth.

14. Respondent is enjoined from creating and posting false profiles of Petitioner on any online website.

15. The parties shall each be responsible for and pay their own attorney's fees and costs incurred in this case.

DATED THIS 10 day of November, 2008.

BY THE COURT



Eric A. Ludlow
District Court Judge

Brent M. Brindley - 7148
BRINDLEY SULLIVAN
A PROFESSIONAL CORPORATION
382 South Bluff Street, Suite 150
St. George, Utah 84770
Telephone: (435) 673-9220
Facsimile: (435) 673-3401
Attorneys for Petitioner

IN THE FIFTH JUDICIAL DISTRICT COURT

IN AND FOR WASHINGTON COUNTY, STATE OF UTAH

SHELLEY L. GISH,

Petitioner,

vs.

RODNEY J. YANKE,

Respondent.

**NOTICE OF SIGNING OF
SUPPLEMENTAL DECREE OF DIVORCE**

Case No.: 064500711

Judge: Eric A. Ludlow

NOTICE IS HEREBY GIVEN that the Supplemental Decree of Divorce was signed by the Honorable Eric A. Ludlow on November 10, 2008, and a copy is attached as Exhibit "A".

DATED this 13th day of November, 2008.

BRINDLEY SULLIVAN


Brent M. Brindley
Attorneys for Petitioner

ADDENDUM EXHIBIT “E”

FILED
2008 AUG 26 AM 11:06
WASHINGTON COUNTY

BY _____

IN THE FIFTH JUDICIAL DISTRICT COURT, IN AND FOR
WASHINGTON COUNTY, STATE OF UTAH

SHELLEY L. GISH,

Petitioner,

vs.

RODNEY J. YANKF,

Respondent.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

Case No. 064500711

Judge Eric A. Ludlow

This matter came before the Court for hearing on December 12, 2007 and again on March 19, 2008. Petitioner was present and was represented by her counsel, Brent M. Brindley. Respondent was present and was represented by his counsel, Christopher A. Tolboc. The Court heard the testimony of the parties and received documents into evidence. Having reviewed the testimony of the parties and the documents received into evidence, the Court makes the following Findings of Fact.¹

¹ Because no depositions have been taken in this case, and because competing affidavits were presented regarding the facts underlying the findings and conclusions filed on April 17, 2007, and the order filed on August 7, 2007, the Court has determined that such findings and conclusions and order were improperly entered in the absence of an evidentiary hearing. See, e.g., Stan Katz Real Estate, Inc. v. Chavez, 565 P.2d 1142, 1143 (Utah 1977) ("[W]hen no depositions have been taken and disputed material facts are alleged in opposing affidavits, there should be an evidentiary hearing to aid in the resolution of those facts."). Consequently, as to the parties' marriage date and the enforceability of the parties' postnuptial agreement, the findings of fact and conclusions of law made here are intended to supersede those filed on April 17, 2007,

FINDINGS OF FACT

1. Prior to September, 2001, Petitioner and Respondent became acquainted and began a romantic relationship.

2. The parties decided to marry and planned to go to Rosarito Beach, Mexico, one of Respondent's favorite vacation destinations to be married.

3. In anticipation of the marriage, Petitioner selected a wedding dress, obtained flowers and made arrangements to take all of the necessary items for the wedding with her on the trip to Rosarito Beach, Mexico.

4. On September 28, 2001, the parties participated in a marriage ceremony performed by José Puig, a minister of the Universal Life Church in Rosarito Beach, Mexico. Petitioner, who had been married three times prior to her marriage to Respondent, and who had obtained a marriage license on each of those three occasions, testified that, although the parties did not obtain a marriage license in Mexico, it was her understanding and belief that the wedding ceremony performed by Mr. Puig was legal and binding in every regard and from that moment

and in the order of August 7, 2007. The Court notes that at the conclusion of the evidentiary hearing held in this matter, the Court directed the parties to submit proposed findings of fact and conclusions of law by May 1, 2008. Based on stipulated motions, the Court subsequently extended the deadline to May 9, 2008, and then to May 27, 2008. To date, the Court has yet to receive proposed findings and conclusions from Respondent. In making its findings and conclusions, the Court has drawn largely on the proposed findings and conclusions prepared by Petitioner.

forward she considered herself to be married to and the wife of Respondent. Respondent's testimony was that the parties knew that they could not meet the qualifications for a legal marriage in Mexico and that the ceremony conducted by Mr. Puig was merely ceremonial and of no legal effect. In this regard, the Court finds the testimony of Respondent more credible. Although the parties intended to live together as, and to hold themselves out as, husband and wife following the marriage, neither party considered the ceremony performed by Mr. Puig to be legally binding and valid.

1 The parties were divorced by this Court's Bifurcated Decree of Divorce on April 17, 2007.

2 When the parties returned from Mexico in September, 2001, they spent a couple of days together at Respondent's residence (on Boston Ivy Court) in Las Vegas, after which Petitioner returned to her residence in Farmington, Utah, and Respondent remained at his residence in Las Vegas. However, the parties intended to unify their households as soon as possible, and began moving Petitioner's belongings into the Houston Ivy home in Las Vegas, where they planned to live.

3 For reasons not clear from the evidence presented, Petitioner did not end up moving to and living in this home as planned. During this period of time, the parties saw each other and lived together as a married couple nearly every weekend, each generally traveling to the other's residence on alternating weekends. They held themselves out as, and acquired a general

reputation among their family members, friends and church and work associates as husband and wife.

8 In July 2001 while engaged to be married, the parties began the process of building a home on Falvo Avenue in Las Vegas (7311 Falvo Ave., Las Vegas, Nevada). As shown in part on Exhibit 11 Bates Stamp Nos. 043 to 048, the down payment and all subsequent payments on this home were made by Respondent. The home was completed in January 2002. Petitioner and Respondent worked together in selecting the lot and the style of the home, and Petitioner's tastes determined the interior design and décor. Additionally, Petitioner was extensively involved in communications with the real estate agent and with those involved in the home's construction. The parties intended to live together as, and to hold themselves out as, husband and wife in the Falvo home. However, when the home was completed, Respondent closed the loan without Petitioner's knowledge or participation, listing himself as an unmarried man and putting only his name on the title. When Petitioner later inquired about these actions, Respondent explained that he had closed in this manner because if he had said that he was married he would not have been able to qualify for the necessary loan without Petitioner's income. Hence, the Court finds that Respondent deliberately held himself out as unmarried in order to obtain a loan and to facilitate closing.

9 The parties began moving their belongings into the Falvo home in January 2002. However, for reasons not clear from the evidence presented, Petitioner did not end up moving to

and living permanently in the Falvo home as planned.

10. In April 2002, Petitioner learned that Respondent was addicted to methamphetamines.

11. Respondent's addiction altered his behavior, making him erratic and unreliable.

12. Because of difficulties in their relationship, but before becoming aware that the difficulties were drug-related, Petitioner sent to Respondent on March 1, 2002, a letter in which she expressed her concern over Respondent's behavior and their relationship. Respondent introduced this letter (Exhibit 1) as evidence that the parties only had a casual romantic relationship, and did not intend for themselves to be married. The letter does support the conclusion that Petitioner felt there would be very little to do in the way of terminating the relationship, if that were what the parties determined to do. On page 1 of the letter, Bates Stamp No. 015, Petitioner states that she "would be willing to meet somewhere - on neutral ground - to [return each other's] belongings]. To properly [and] maturely say goodbye. Perhaps to hold each other one last time." Moreover, on page 2 of the letter, Bates Stamp No. 013, Petitioner states that Respondent had "own[ten] [her] [and] *this marriage off*" (Emphasis added.) (On page 3 of the letter, Bates Stamp No. 014, Petitioner states that she wants "this marriage." Also on page 3 Petitioner twice refers to Respondent as "my husband." The Court finds that Exhibit 1, taken as a whole, supports the conclusion that the parties considered themselves married, though not legally so.

13. Exhibit 2, Bates Stamp No. 022, is the first page of a revolving credit deed of trust dated April 11, 2002 that refers to Petitioner as "Shelly [sic] Sybil Gish, a single woman." Exhibit 2 is an incomplete document and does not have a signature page. But Petitioner testified that it was likely part of documentation related to a home equity line of credit and that she did not realize it listed her as a single woman until Respondent's counsel brought it to her attention. "He suggested that she may have been so listed because she had held an account at Zions Bank for several years prior to obtaining the loan, during which time she had in fact been single. The Court finds this explanation unsatisfactory. Petitioner testified that, after the parties' marriage in Mexico, she changed her name to make on her bank records. Exhibit 2 indicates that, more than six months after the parties' marriage in Mexico, Petitioner's name was still not changed on all of her bank records. Accordingly, the Court finds that Exhibit 2 demonstrates that, following the parties' marriage in Mexico, Petitioner did not consistently hold herself out as Respondent's wife in her financial dealings.

14. Exhibit 3, Bates Stamp Nos. 018-021, is an affidavit of Petitioner, which has also been filed in this matter separately. In paragraph 7 of her affidavit, Petitioner acknowledged that she and Respondent filed separate tax returns from 2002 through 2004. At trial, Petitioner further acknowledged that she filed as "single, head of household" during these years. Petitioner testified that this was done at Respondent's insistence to maximize the amount of refund he would obtain. However, shortly before giving this explanation, Petitioner testified that the

parties filed in this way because the IRS refused to recognize their marriage in Mexico for tax purposes, and instructed them to continue filing as unmarried persons until they had obtained a legal marriage in Utah. Petitioner further testified that she showed tax officials the marriage certificate the parties were given in Mexico, as well as the parties' wedding photographs in an unsuccessful effort to persuade them to accept the parties' marriage for tax purposes. Petitioner further testified that she requested, shortly after the parties' marriage in Mexico, that Respondent marry her legally in Utah to resolve these difficulties, but that Respondent initially refused to do so, saying that it was not necessary. The Court accepts all of Petitioner's testimony.

summarized here, and therefore finds that, despite the way she filed her taxes, Petitioner held herself out to the IRS as the wife of Respondent. However, the Court finds that Respondent deliberately held himself out to the IRS as unmarried in order to receive a tax benefit.

Before the Utah's stamp 11-02-05 marriage license application the parties completed prior to being married in Utah in December of 2005. In paragraph 29 of the application, the parties certified that they were unmarried and able to marry each other. Petitioner testified, and the Court finds, that Petitioner and Respondent discussed their prior marriage in Mexico with the clerk and explained that they were being married again in Utah for tax purposes. Petitioner further testified, and the Court finds, that the clerk indicated it was acceptable for the couple to be married to each other, just not to anyone else. Respondent testified that he did not hear Petitioner discuss the parties' prior marriage with the clerk. The

Court rejects this testimony as not credible. Respondent further testified that he and Petitioner did not consider themselves to be legally married at that time and therefore that they could now legally be married. The Court accepts this testimony, but finds that the parties held themselves out as married to each other in applying for the marriage license, despite believing that their marriage was not legally valid. The parties signed paragraph 29 either to certify that they were not *legally* married, or to certify that they were not married to anyone except each other.

16. Exhibit 6, Bates Stamp No. 087, is a quitclaim deed dated May 12, 2005, that refers to Petitioner as "Shelley L. Gish." Exhibit 6 demonstrates that, following the parties' marriage in Mexico, Petitioner did not always use the last name Yanke, or consistently hold herself out as Respondent's wife in her financial dealings.

17. Immediately following her marriage to Respondent on September 28, 2001, Petitioner had her name on the records of the Church of Jesus Christ of Latter-day Saints changed from her single name to the married name of Yanke and had her record moved to the ward the Falvo home was in. She likewise changed her name to Yanke on her property tax records, her Utah insurance policies, and her credit report. However, she did not change her legal name to Yanke at that time. She testified, and the Court finds, that she did not so change her name with the Social Security Administration or with the Utah Bureau of Census Division at that time.

because these agencies declined to recognize the marriage performed in Mexico.² Accordingly, the Court finds that Petitioner's failure to change her name to Yanke with the Social Security Administration or with the Utah Driver's License Division does not reflect a failure on her part to hold herself out as married to Respondent. On the contrary, the Court finds that Petitioner affirmatively held herself out to these agencies as the wife of Respondent, but that these agencies declined to accept the parties' marriage as legally valid.³

18. In January 2003, Respondent was fired from his employment with Sprint in Las Vegas. As a couple, the parties decided that under the circumstances the best course of action was for Respondent to move into Petitioner's home in Ivins, Utah. Respondent moved into Petitioner's home in March 2003. Petitioner loved Respondent and was concerned for his welfare and wanted to help him overcome his addiction.

19. Exhibit 9 is a homestead declaration signed by Respondent on March 7, 2003. In the homestead declaration, Respondent identifies himself as a married man and verifies Petitioner, whom he identifies as Shelley Lee Yanke, as his wife. The Court finds that the declaration of

² Petitioner testified that these agencies "told [the parties] that even though [their] marriage in Mexico was considered a legal marriage, it wasn't recognized in the State of Utah until [the parties] went and were married in the State of Utah" The Court rejects Petitioner's representation that the agencies characterized the parties' marriage in Mexico as "a legal marriage."

³ In paragraph 5 of the affidavit introduced as Exhibit 11, Bates Stamp Nos. 004 to 007, Respondent confirms that Petitioner "tried to change her legal name and her drivers license from the name Oish to Yanke."

homestead demonstrates that, at times, Respondent held himself out as Petitioner's husband.

20. Exhibit 10 is a handwritten document prepared by Respondent, and dated September 25, 2004. In this document, Respondent identifies Petitioner as his wife and declares her the beneficiary of his entire estate. The Court finds that this document demonstrates that, at times, Respondent held himself out as Petitioner's husband.

21. Respondent's continuing drug addiction caused problems for Petitioner. Respondent was unreliable, and would often fail to take care of business matters. On at least one occasion, he failed to show up at a real estate closing where his presence was needed. Respondent recognized that his behavior was having a negative impact on the parties' business and their relationship. Exhibit 20 is a general power of attorney Respondent signed and had notarized in favor of Petitioner on July 8, 2003, to provide relief to Petitioner from his own unreliability. In the power of attorney, Respondent identified Petitioner as Shelly Lee Gish Yankc. The Court finds that the power of attorney demonstrates that, at times, Respondent held himself out as Petitioner's husband.

22. At the time the parties were married in Mexico, Respondent owned the property on Falvo Avenue in Las Vegas, where he was building the intended marital home of the parties. Petitioner owned a home in Ivins, Utah.

23. Petitioner is a licensed realtor in Utah. Following Respondent's move to Utah in March 2003, the parties acquired three residential properties in Washington County, Utah, that

are at issue here.

24. One of the homes acquired was referred to at trial as the Daybreak home (570 N. Daybreak Dr., St. George, Utah). At trial, the parties agreed that Exhibit 13, Bates Stamp No. 049, is a copy of a check (for \$49,657.74) that constituted the bulk of the down payment (of \$54,657.74) on the Daybreak home. Respondent testified that the money for that check came from cash that he brought with him to Utah from Las Vegas. Petitioner testified that part of the money for that check was hers, but that she could not state precisely how much because the parties kept their cash—including about \$20,000 cash that she had saved from sources such as her employment and foster care—in the same safety deposit box. Based on the competing testimony, and in the absence of any records, the Court is unable to determine the amount of money contributed by each party toward the down payment on the Daybreak home.

25. Another of the homes acquired was referred to at trial as the Robbin Court home (3400 Robbin Court, Santa Clara, Utah 84765). Exhibit 14, Bates Stamp No. 051, is a copy of a check written by Respondent to Petitioner for \$60,000, dated July 16, 2003, made from Respondent's personal account. A notation on the check indicates that it is intended to be applied to a down payment on the Robbin Court home. Exhibit 14, Bates Stamp No. 052, is a copy of a check written by Respondent to Petitioner for \$15,000, also dated July 16, 2003, made from an account Respondent held as custodian for his children. A notation on this check indicates that it is also to be applied to a down payment on the Robbin Court home.

26. Exhibit 14, Bates Stamp No. 054, is a copy of a receipt dated August 1, 2003, showing that Petitioner made a down payment of \$72,040.64 on the Robbin Court home. The Court finds that the money Petitioner used to make this down payment came entirely from Respondent, as just set forth above. It is unclear what the remaining balance of \$2,959.36 of the funds Respondent gave Petitioner was used for.

27. Additionally, Exhibit 14, Bates Stamp No. 054, shows that Petitioner made this down payment using the name Gish, rather than Yanke, demonstrating that, following the parties' marriage in Mexico, she did not consistently hold herself out as Respondent's wife in her financial dealings.

28. Finally, the parties acquired a home referred to at trial as the Ivins home (832 South 375 East Circle, Ivins, Utah 84738). Exhibit 15, Bates Stamp Nos. 059 to 062, are copies of documents related to the purchase of the Ivins home. The Court finds that the parties made a down payment of \$59,617 to purchase the Ivins home. Respondent paid \$40,617 (including the earnest money deposit of \$500) cash toward the down payment. Petitioner obtained, on credit, the additional \$19,000 paid.

29. After moving to Utah, Respondent would sometimes disappear for several days at a time due to his methamphetamine addiction. Respondent left Petitioner solely responsible for maintaining their home and the other investment properties, including collecting rent, maintenance, and paying the parties' bills.

30. Petitioner made extraordinary efforts to maintain the parties' relationship because of the deep love she felt for Respondent, and tolerated an extreme amount of irrational and abusive behavior on Respondent's part.

31. After April 2002, when Petitioner learned of Respondent's drug addiction, Respondent underwent rehabilitation and counseling for his addiction. Petitioner provided emotional support and participated in these rehabilitative efforts, but Respondent failed to recover.

32. Because of Respondent's continuing drug-related problems and behavior in 2005, the parties discussed the condition of their relationship. Respondent acknowledged that his behavior had been unacceptable, and promised Petitioner that he would change his behavior in order to save the parties' marriage. In order to clarify the tax issues, Petitioner and Respondent decided to be legally married in Utah. The parties were legally married on December 30, 2005 in Santa Clara, Utah. Respondent represented to Petitioner that if he disappeared again as a result of his drug addiction, he would understand if she sought a divorce.

33. Following the parties' marriage on December 30, 2005, Respondent's drug problems continued. On May 9, 2006, Respondent disappeared again. When he returned home "loaded" two or three days later, Petitioner felt she could not handle it anymore. She locked the doors to the Robbin Court home, where the parties were living, and refused to let him in.

34. In the week following Respondent's disappearance, the parties discussed separation

and divorce options. Petitioner modified a petition for divorce that she had originally drafted when the parties were having difficulties in their relationship in October 2004, had the petition notarized, and left a copy of the petition in Respondent's car. Exhibit 7, Bates Stamp Nos. 083 to 086, is a copy of that petition, which was never filed nor formally served on Respondent.

35. After much discussion, the parties agreed that they would try to save their marriage. The parties made an agreement under which Respondent was to make certain changes in his behavior and get the help that he needed. If Respondent was not able to make the changes as stated in the agreement, the agreement also provided for the division of property in the event of divorce. The parties' agreement was written in two separate documents, respectively designated as a "Post Nuptial Agreement" and a "Property Settlement agreement." The parties signed and had these agreements notarized on May 19, 2006. The first page of Exhibit 21 is a copy of the parties' "Post Nuptial Agreement."

36. Exhibit 5, Bates Stamp No. 071, is a copy of the "Property Settlement agreement" the parties signed on May 19, 2006.⁴ Petitioner testified that the parties prepared this document

⁴ At trial, Petitioner introduced the second page of Exhibit 21 as a copy of the parties' "Property Settlement agreement." This document differs from Exhibit 5, most notably due to the presence of a handwritten, underlined "OR" adjacent to provision 1.E. of the document. When questioned about this difference at trial, Petitioner suggested that the "OR" may have been "whited out" for Exhibit 5, which was introduced by Respondent. However, in her proposed findings and conclusions, Petitioner identifies Exhibit 5 as the parties' property settlement agreement. The Court adopts this proposed finding.

based on a letter that Respondent had provided to her previously,⁵ and that they modified the agreement until Respondent was fully satisfied with it. Petitioner further testified that both parties signed the "Property Settlement agreement" freely and voluntarily and that Respondent was under no duress or coercion in signing the property settlement agreement.

37. Respondent testified that Petitioner approached him with the "Property Settlement agreement" and demanded that he sign it or she would not permit him back in the parties' home and she would divorce him immediately. Respondent testified that he felt he had no choice but to sign the "Property Settlement agreement," that he was not advised of his right to have the agreement reviewed by counsel, and that he felt, because of the coercive nature of Petitioner's demand that he sign it, that the agreement would not be legally enforceable. Respondent further testified that he was unaware of certain financial transactions performed by Petitioner at the time he signed the agreement, and that if he had been informed of such transactions, he would not have signed it.

38. The Court finds that Petitioner's testimony here is credible, and that Respondent's testimony here is not credible. The Court finds that the "Property Settlement agreement" signed on May 19, 2006 was freely and voluntarily entered into by both parties after full disclosure, and that it was entered into after both parties had been given the opportunity to have the document

⁵ The letter referred to was not offered into evidence at trial.

reviewed by their respective counsel of choice.

39. Since the parties signed the "Property Settlement agreement," Respondent has filed multiple legal actions and filed numerous complaints to initiate investigations of Petitioner, copies of some of which are included as Exhibits 16, 17, 18, and 19. On the basis of the evidence presented at the evidentiary hearing, the Court is unable to determine the propriety of such actions and complaints.

40. Paragraph 1 of the "Property Settlement agreement" provides:

3400 Robbin Court, Santa Clara UT to be the personal residence of Sybil and the kids until it sells. At that time, we will

- A. Pay off the house debts, 1st mortgage and Hcloc.
- B. Pay Rod back his \$240,000.00.
- C. Pay Sybil back her \$58,000.00 .
- D. Divide the difference.
- E. Refi the house loan, to bring down the payments, and each have some cash to move forward with now. Which would leave all bills and debts as they are now, being paid from the rent, until the house sells.

41. The \$58,000 referred to in subpart C was money that Sybil had obtained from the sale of the home in Ivins that she owned at the time the parties were married, and the majority of which she subsequently used for the payment of the personal debts of both parties.

42. At trial the parties reached an agreement regarding the division of personal property.

43. The parties entered into the property settlement agreement to resolve the property issues and to avoid lengthy and costly litigation over those issues. From the evidence presented,

the Court is unable to say that either party is solely responsible for the litigation that has resulted involving these issues.

CONCLUSIONS OF LAW

Validity of Parties' Marriage in Mexico

The parties dispute the validity of the marriage ceremony performed in Rosarito Beach, Mexico on September 28, 2001. Under U.C.A. Section 30-1-4, with certain exceptions not applicable here, "[a] marriage solemnized in any other country . . . , if valid where solemnized, is valid here[.]" At the evidentiary hearing on December 12, 2007, Respondent presented the Court with a document purporting to contain the requirements for a valid marriage in Mexico. However, because Respondent failed to lay a sufficient foundation for the document, it was not admitted into evidence. No other evidence was presented as to the marriage law of Mexico.⁶

Because Respondent has not presented any admissible evidence as to the requirements for a valid marriage in Mexico, the Court presumes that the marriage law of Mexico is the same as that of Utah. See Maple v. Maple, 566 P.2d 1229, 1230 (Utah 1977) ("[U]nless the law of a foreign jurisdiction is proved to be otherwise, it will be presumed to be the same as the law of the forum states.") (footnote omitted).

⁶ On March 11, 2008, Respondent filed a motion to permit the reverend who officiated in the marriage to testify in the hearing on March 19, 2008. At the beginning of the March 19, 2008 hearing, this motion was denied.

Operating under this presumption, the Court concludes that the marriage of September 28, 2001, was invalid. Under U.C.A. Section 30-1-7(1), “[n]o marriage may be solemnized in this state without a license issued by the county clerk of any county of this state.” It is undisputed that the parties did not obtain a marriage license to be married in Mexico. Accordingly, the marriage could not have been validly solemnized.

Citing U.C.A. Section 30-1-5(1),⁷ Petitioner has argued that, because she had a good-faith belief that the parties’ marriage was legally valid, it may not now be declared invalid. Assuming, for the sake of argument, that this provision could apply in the way urged by Petitioner (i.e., that a party’s good-faith belief in the validity of the marriage is equivalent to a good-faith belief in the authority of the person performing the marriage), where at least one of the parties had a good-faith belief that the marriage was valid, the Court nevertheless finds this factual predicate absent here. Both parties knew they needed a marriage license to obtain a legally valid marriage, and both parties knew that they had not obtained such a license. Hence, neither party held a good-faith belief that the marriage was legally binding.

Finally, the Court considers whether the parties had a valid common-law marriage.

⁷ Section 30-1-5 (1) provides:

A marriage solemnized before a person professing to have authority to perform marriages shall not be invalidated for lack of authority, if consummated in the belief of the parties or either of them that he had authority and that they have been lawfully married.

Under U.C.A. Section 30-1-4.5(1),

A marriage which is not solemnized according to this chapter shall be legal and valid if a court or administrative order establishes that it arises out of a contract between a man and a woman who:

- (a) are of legal age and capable of giving consent;
- (b) are legally capable of entering a solemnized marriage under the provisions of this chapter;
- (c) have cohabited;
- (d) mutually assume marital rights, duties, and obligations; and
- (e) who hold themselves out as and have acquired a uniform and general reputation as husband and wife.

Several of these requirements are met here. On September 28, 2001, when the parties participated in the marriage ceremony in Mexico, they were both of legal age, were capable of giving consent, and were legally capable of entering a solemnized marriage under Chapter 1 of Title 30 of the Utah Code. They have cohabited during much of the time since that marriage, as set forth in the findings above. In the ceremony performed in Mexico, they mutually assumed marital rights, duties, and obligations.

However, the parties failed to satisfy the requirements of Subsection (1)(e). Although they did generally hold themselves out as husband and wife, and acquired a general reputation as such among their family members, friends, and church and work associates, they also each, in different circumstances where they deemed it convenient, held themselves out as unmarried. For instance, Respondent held himself out as unmarried in order to qualify for a loan necessary to close the Falvo home purchase in January 2002, and in order to obtain a greater tax refund during

the years 2002 to 2004. Similarly, Petitioner held herself out as single when obtaining a home equity line of credit in April 2002, when making a down payment on the Robbin Court home in August 2003, and when quitclaiming property to her son in May 2005. These instances demonstrate that, although the parties held themselves out as, and acquired a “general” reputation as, a married couple, they did not *always* so hold themselves out, and did not have a “uniform” reputation as such, as required by the plain language of the statute.” Cf. 52 Am. Jur. 2d Marriage § 40 (LexisNexis 2008) (“While the holding out as husband and wife must be clear and substantial, slight inconsistency in this regard will not destroy an otherwise valid common-law marriage.”) (footnote omitted).

To hold otherwise would be to violate the rule that every term of a statute is to be given meaning. See, e.g., State v. Candelario, 909 P.2d 277, 279 (Utah Ct. App. 1995) (“Because we assume every word in the statute was chosen advisedly by the Legislature, we resist concluding it would have chosen redundant language.”). Accordingly, the Court holds that the parties failed to obtain a uniform reputation as husband and wife, as required by Subsection (1)(e), and therefore did not have a valid common-law marriage under Utah’s statutory scheme. See Whyte v. Blair,

⁸ In Hansen v. Hansen, 958 P.2d 931 (Utah Ct. App. 1998), the Court of Appeals addressed the meaning of Subsection (1)(e), stating that, “[a]lthough Utah courts have yet to specify the requirements of this provision, courts of other jurisdictions have consistently held that a ‘partial or divided’ reputation of marriage is insufficient.” Id. at 936 (citations omitted). However, from the case excerpts quoted in Hansen, the court appears to have been addressing only the meaning of the term “general,” rather than the meaning of the term “uniform.”

885 P.2d 791, 794 (Utah 1994) ("Evidence of each element is essential.").

Enforceability of Parties' Postnuptial Agreement

The parties also dispute the enforceability of the "Property Settlement agreement" entered into on May 19, 2006 (i.e., Exhibit 5, Bates Stamp No. 071). Under D'Aston v. D'Aston, 808 P.2d 111 (Utah Ct. App. 1990), "a postnuptial agreement is enforceable in Utah absent fraud, coercion, or material nondisclosure." Id. at 113 (footnote omitted). Because the Court has found that the "Property Settlement agreement" here was made without fraud, coercion, or material nondisclosure, the Court concludes it is enforceable.

Modification of Postnuptial Agreement

In her proposed findings and conclusions, Petitioner has argued, in effect, that the Court should make a number of changes, in her favor, to the "Property Settlement agreement." Petitioner's argument is based on her assertion that Respondent has engaged in a process of unrelenting harassment through, among other things, the filing of legal actions and administrative complaints. As stated above, the evidence presented here was insufficient to permit the Court to make any determination as to the propriety of Respondent's various filings.

In D'Aston, the Court of Appeals expressed doubt as to whether trial courts may ever depart from the terms of an enforceable postnuptial agreement, saying that "even if a trial court has the equitable power to disregard an otherwise enforceable postnuptial property settlement agreement and to distribute the separate property of the spouses, the circumstances must be

unique and compelling to justify the application of such an exception.” 808 P.2d at 114 n.6 (emphasis added). Given the insufficiency of the evidence noted above, the Court cannot conclude that the “unique and compelling” standard set forth in D’Aston is met here, and consequently need not reach the separate question of the Court’s ability to modify a postnuptial agreement under circumstances where that standard is satisfied.⁹ No modification is made to the “Property Settlement agreement.”

Personal Property

The parties are each awarded the personal property as agreed at trial. Insofar as either party is in possession of personal property belonging to the other, the parties are ordered to arrange to return such personal property within 30 days of the entry of the supplemental decree in this case.

Petitioner’s Request for Attorney Fees

In her proposed findings and conclusions, Petitioner has also argued, in effect, that the Court should award her attorney fees based on Respondent’s alleged attempted repudiation of the

⁹ If Respondent has instituted litigation and other civil proceedings merely as a means of harassing Petitioner, her remedy may be to pursue an independent action for abuse of process or wrongful use of civil proceedings. See, e.g., Anderson Dev. Co. v. Tobias, 116 P.3d 323, 340-41 (Utah 2005) (discussing the elements of abuse of process and wrongful use of civil proceedings). As a rule, such claims should be pursued outside of divorce proceedings. See Noble v. Noble, 761 P.2d 1369, 1371 (Utah 1988) (“Tort claims, which are legal in nature, should be kept separate from divorce actions, which are equitable in nature.”).

parties' "Property Settlement agreement." Petitioner has cited no authorities in support of her request for attorney fees. Assuming that the Court could grant the request if it had found Respondent to have engaged in the conduct alleged by Petitioner, the Court has nevertheless been unable to so find.

Additionally, in a divorce action, attorney fee awards "are controlled by [U.C.A.] section 30-3-3(1), which allows an award, at the trial court's discretion, based on the need of a party." Ostermiller v. Ostermiller, 2008 UT App 249, ¶ 7 n.7 (Utah Ct. App. 2008). Because no evidence was presented as to Petitioner's need for attorney fees, or as to Respondent's ability to pay them, or as to the amount and reasonableness of the fees requested, no such fees are awarded here. See Gardner v. Gardner, 748 P.2d 1076, 1082 (Utah 1988) ("[A] request for attorney fees must be accompanied by evidence at trial as to the nature and amount of such fees.") (citing Warren v. Warren, 655 P.2d 684, 688 (Utah 1982) (trial court properly denied wife's attorney fee request where she "offered no evidence at trial to show the nature or amount of any attorney fees incurred in litigating the present action or any need for court-ordered assistance in the payment of such fees.")).

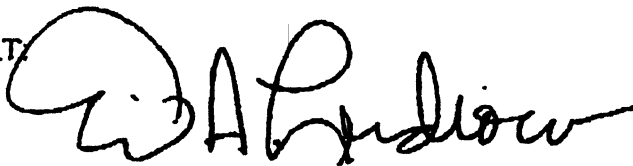
ORDER

It is hereby ORDERED, ADJUDGED, and DECREED that:

1. Petitioner shall submit a proposed Supplemental Decree, consistent with the foregoing Findings and Conclusions, within 10 days of the date these Findings and Conclusions are issued;
2. Following Petitioner's filing of the proposed Supplemental Decree, Respondent shall have 10 days in which to file any objections, after which Petitioner shall have 10 days to file any response.

Dated this 26th day of August, 2008.

BY THE COURT



Eric A. Ludlow
District Court Judge

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 064500711 by the method and on the date specified.

METHOD NAME

Mail CHRISTOPHER A TOLBOE
Attorney RES
2181 E KNOLLS DR
ST GEORGE, UT 84790

By Hand BRENT M BRINDLEY

Dated this 26 day of August, 2008.

P Jordan
Deputy Court Clerk